No. 87-1708

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In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES P. TIERNEY, et al.,
Appellants,

vs.

THE PLANNED INDUSTRIAL EXPANSION AUTHORITY OF KANSAS CITY, MISSOURI, et al.,
Appellee.

JAMES P. TIERNEY, et al.,
Appellants,

vs.

THE HONORABLE H. MICHAEL COBURN,
Circuit Judge, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the Missouri Planned Industrial Expansion Law, Missouri Revised Statutes Sections 100.300 to 100.620 (1986), violates the due process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States, when applied to condemn Appellants' property as "blighted" and to permit Appellants' property to be taken for private redevelopment, on the basis that the property could be put to a higher economic use.

LIST OF PARTIES

JAMES P. TIERNEY, GEORGE E. TIERNEY, WILLIAM J. TIERNEY and THOMAS F. TIERNEY,

Appellants,

vs.

THE PLANNED INDUSTRIAL EXPANSION AUTHORITY OF KANSAS CITY, MISSOURI, KANSAS CITY CORPORATION FOR INDUSTRIAL DEVELOPMENT, WHITNEY E. KERR, K-A COMPANY and THE CITY OF KANSAS CITY, MISSOURI,

Appellees.

STATE OF MISSOURI, ex rel.,
JAMES P. TIERNEY,
GEORGE E. TIERNEY,
WILLIAM J. TIERNEY,
THOMAS F. TIERNEY,

Appellants,

vs.

THE HONORABLE H. MICHAEL COBURN,
Circuit Judge and
CARL E. BOLTE, JR.,
ROBERT THANE JOHNSON, and
KEITH P. BONDURANT,
Commissioners,

Appellees.

TABLE OF CONTENTS

Question Presented I
List of Parties II
Opinions Below 2
Jurisdiction 2
Constitutional Provisions and Statutes 3
How the Federal Question Was Raised 3
Statement of the Case 6
The Question Is Substantial 10
Conclusion 12
Appendix A1

TABLE OF AUTHORITIES

Cases:

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 10, 11
Schneider v. District of Columbia, 117 F. Supp. 705 (D.D.C. 1953), *aff'd as modified sub nom. Berman v. Parker*, 348 U.S. 26 (1954) 11
State ex rel. Washington University Medical Center Redevelopment Corp. v. Gaertner, 626 S.W.2d 272 (Mo. 1982) (en banc) 4
United States v. Carmack, 329 U.S. 230 (1946) 12

Statutes:

Missouri Revised Statutes Sections 100.300 to 100.620 (1986) 1, 3, 6
Missouri Revised Statutes Section 100.310(2) (1986) 7

No.

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ON APPEAL FROM THE SUPREME COURT OF MISSOURI

JURISDICTIONAL STATEMENT

James P. Tierney, George E. Tierney, William J. Tierney, and Thomas F. Tierney, Appellants, appeal from the final judgment of the Supreme Court of Missouri, dated December 15, 1987, holding that the Planned Industrial Expansion Law, Missouri Revised Statutes Sections 100.300-.620 (1986), is not unconstitutional as being violative of Appellants' rights to due process as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri, which appears in the appendix hereto, p. A28, *infra*, is reported at 742 S.W.2d 146 (1987).

The opinions of the Missouri Court of Appeals, Western District, filed March 31, 1987 (Case No. 38633) and February 10, 1987 (Case No. 38208), are not reported. They appear in the appendix hereto, at pp. A8 and A22, *infra*. The findings of fact and decision of the Circuit Court of Jackson County, Missouri, dated July 22, 1987 (Case No. 26543), are not reported. They are reprinted in the appendix hereto, p. A3, *infra*. The Amended Order of the Circuit Court of Jackson County, dated February 27, 1986 (Case No. 26546) is not reported. It is reprinted in the appendix hereto, p. A7, *infra*.

JURISDICTION

The judgment of the Supreme Court of Missouri, affirming the decision in one of the consolidated cases, and quashing the preliminary rule in the second case, was entered on December 15, 1987. *See* p. A28, *infra*. A motion for rehearing was entertained and denied on January 20, 1988. *See* p. A63, *infra*.

A supplementary notice of appeal to this court was timely filed in the Supreme Court of Missouri on March 21, 1988. *See* p. A65, *infra*.

This appeal is being docketed in this Court within ninety (90) days from the denial of rehearing below. The jurisdiction of this Court is invoked under 29 U.S.C. Section 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment, United States Constitution:

No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

No state . . . shall . . . deprive any person of . . . property without due process of law.

Missouri Revised Statutes Sections 100.300-.620:

The pertinent text of these provisions is set forth in the appendix hereto, p. A1, *infra*.

HOW THE FEDERAL QUESTION WAS RAISED

At the earliest stage of the proceedings in these two consolidated cases, the Appellants raised the claim that the actions of the Planned Industrial Expansion Authority (PIEA) of Kansas City, Missouri and of the City of Kansas City, in applying the Planned Industrial Expansion Law to Appellants' property, were arbitrary and capricious, and thus unconstitutional.

In their Petition for Declaratory Judgment, for Permanent Injunction, and for Damages for Tortious Conduct, Appellants prayed for a judgment declaring that the Planned Industrial Expansion Law was unconstitutional as applied to Appellants' property, and that the ordinances adopted by the City Council of Kansas City were arbitrary, unreasonable, and unconstitutional. Petition in Case No. CV85-26546, Circuit Court of Jackson

County, Missouri, at p. 13. All three Counts of this Petition were dismissed by the trial court; the judge, however, announced that he would permit Appellants to raise as defenses in the trial of the companion case, the eminent domain action brought by the PIEA, all claims Appellants raised in the declaratory judgment action, including constitutional claims.

This was significant because in an eminent domain suit in Missouri the ordinary rules of civil procedure do not apply. There is nothing requiring or even providing for responsive pleadings. The issue of the right to take property is determined in a summary proceeding. *See State ex rel. Washington Univ. Medical Center Redevelopment Corp. v. Gaertner*, 626 S.W.2d 272 (Mo. 1982) (en banc).

Although no formal opinion was issued at the trial court level, the Order of the Circuit Court of Jackson County, Missouri, p. A3, *infra*, entered after trial, recites that court's finding that the PIEA and the City "did not act arbitrarily and without a factual foundation," in finding Appellants' property blighted and condemning it.

Appellants thereupon filed a petition seeking a writ of prohibition in the Missouri Court of Appeals, Western District, raising again therein the due process issue. The due process issue was raised in Point III of Relators' (Appellants') Brief as follows:

> The trial court erred in entering an order of condemnation in that the City Council could not empower the PIEA to condemn landowners' property because (a) the standards for a blighted or insanitary or undeveloped industrial area, as applied by PIEA and the City in this case, are too vague and indefinite

> to be constitutional, and (b) the expansion of the original blighted area to include landowners' property, where a predominance of the added property was not shown to be blighted, is unlawful as not a taking for a public use.

Relators' (Appellants') Brief in Case No. WD38633, at p. 27.

The Missouri Court of Appeals ruled for Appellants, but on a nonconstitutional ground, making its writ of prohibition absolute. Opinion of the Missouri Court of Appeals, Western District, Case No. WD38633, p. A8, *infra*. The constitutional issue was also raised when Appellants appealed the dismissal of the declaratory judgment case. Opinion of the Missouri Court of Appeals, Western District, Case No. WD38208, p. A22, *infra*.

The case was transferred to the Missouri Supreme Court, where supplemental appellate briefs were filed, in which the due process issue was reargued. The Missouri Court upheld the validity of the taking. Missouri Supreme Court Opinion, p. A28, *infra*. Appellants again raised the due process issue in their Motion for Rehearing, which was denied January 20, 1988, without opinion. Order Denying Motion for Rehearing, p. A63, *infra*.

STATEMENT OF THE CASE

The Appellants in this case are the owners of property on which is situated a structurally sound and historically significant building, the earliest example of Art Deco architecture in Kansas City. These consolidated actions arise out of a suit for condemnation filed by the Planned Industrial Expansion Authority of Kansas City, Missouri (PIEA) to acquire Appellants' property, and Appellants' action brought to stop the condemnation. The statutory authority asserted to condemn the property was the Planned Industrial Expansion Law, Missouri Revised Statutes Sections 100.300 to 100.620, which permits an area that is found to be blighted, insanitary or an undeveloped industrial area to be taken for the purpose of redevelopment. In 1978, the Kansas City Corporation for Industrial Development caused a blight survey to be made of an initial project area of the city that did not include the Appellants' property. The "blight expert" who did the survey issued a report finding the initial project area to be blighted. The PIEA submitted that report to the City Plan Commission and City Council with a recommendation that the initial project area be declared a blighted area. This the city did by Ordinance No. 53137, passed August 18, 1981. This finding made the initial project area available to be condemned for redevelopment under the Planned Industrial Expansion Law.

Some months later, the PIEA wished to expand the project area to encompass additional property to the east and west of the initial area. The additional property to the east included Appellants' property. The same blight expert was asked to make a new survey of the entire ex-

panded area. The new survey found the entire area to be blighted, although no substandard or blighted structures were found in the two areas added on the east and west of the initial project area. To justify a taking, the Missouri statute requires that a "predominance" of blight be found in the project area. Mo. Rev. Stat. § 100.310(2). Unable to find a predominance of physical blight in the area as expanded, the expert found "economic underutilization" of property in the area. Properties deemed to be economically underutilized included all city thoroughfares in the project area, even though the blight expert found the condition of the streets to be "quite good" and did not take into account their necessity for urban traffic flow. In addition, any property used for parking for adjacent businesses, no matter how good the condition of the parking area and how necessary for the adjoining businesses, was deemed to be *per se* economically underutilized because that land could be put to a higher use. The sole test applied in determining whether a property was economically underutilized was whether it could be put to a higher use. Only by combining such economically underutilized property with property found to be physically blighted was the expert able to establish a predominance of blight. Again, at the request of the PIEA, the City Council passed an ordinance declaring the entire expanded area to be blighted.

The PIEA then prepared a redevelopment plan calling for solely commercial redevelopment of the area designated as blighted, and submitted it to the City Council, which approved it. Later, the PIEA filed a petition in the Circuit Court for Jackson County, Missouri, for condemnation of Appellants' property. On the same day, Appellants filed a declaratory judgment action, seeking to have the proposed taking declared unlawful.

Counts I and III of the declaratory judgment action were dismissed with prejudice by the trial court. This dismissal was appealed to the Missouri Court of Appeals for the Western District, which held that the trial court did not err dismissing the declaratory judgment action, because other adequate remedies at law existed and there was no basis for tort liability. *See* Opinion of Missouri Court of Appeals, Western District, Case No. WD38208, p. A27, *infra.* This holding was affirmed by the Missouri Supreme Court. *See* Opinion of Missouri Supreme Court, p. A47, *infra.*

At the same time, the condemnation suit brought by the PIEA was ongoing. In that case the Circuit Court entered its order sustaining the petition for condemnation, and appointing commissioners who would view the properties condemned and return to the Circuit Court clerk an assessment of the damages incurred by Appellants by reason of the condemnation. *See* Order of Circuit Court for Jackson County, Missouri, Case No. CV85-26543, p. A6, *infra.* At that time, Appellants filed an original proceeding in prohibition in the Missouri Court of Appeals for the Western District, seeking to halt the condemnation proceedings. A writ of prohibition was deemed necessary because, under Missouri condemnation law, the improvments to the property could have been destroyed as soon as the commissioners returned their valuation to the clerk and the Appellees had paid in to the court the amount of the damages assessed. This destruction could occur despite the pendency of an appeal, and despite the fact that the owners might ultimately avoid the condemnation of their property. *See* Opinion of Missouri Court of Appeals, Western District, Case No. WD38633, p. A13, *infra.*

A preliminary writ was issued by the Missouri Court of Appeals, and, after oral argument, was made absolute on March 31, 1987. *See* Opinion of Missouri Court of Appeals, Western District, Case No. WD38633, p. A21, *infra.* Thus the condemnation proceedings were halted, and the Appellants' property was not destroyed.

In its opinion making the writ absolute, the Court of Appeals noted that, "(t)he power of the State to condemn, and particularly the delegation of that power to corporations public and private, is viewed jealously, and its exercise carefully limited." *See* Opinion of Missouri Court of Appeals, Western District, Case No. WD38633, p. A15, *infra.* The Court found that the action taken by the City Council in approving the PIEA's redevelopment plan was in fact arbitrary, and included "no factual material of any sort" supporting the condemnation. *Id.* at A17.

The Missouri Supreme Court, consolidating the declaratory judgment case with the condemnation/writ of prohibition case, found that the actions of the City Council and the PIEA were not arbitrary, and held that the concept of "economic underutilization" - that property could be put to a higher economic use - was a lawful basis for condemnation and did not violate due process. *See* Missouri Supreme Court Opinion, p. A35, *infra.*

THE QUESTION IS SUBSTANTIAL

The question as to the Fifth and Fourteenth Amendment implications of the use of an "economic underutilization" standard in declaring a parcel of property blighted, and thus available for condemnation for redevelopment purposes, is a substantial one, and has been refined recently by this Court in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

The holding of that case was that the use of the condemnation power by the State of Hawaii to regulate the oligopolistic concentration of most of the privately owned lands in Hawaii in 72 private landowners was a proper public purpose supporting the use of eminent domain. The Court recognized that by reason of the Fourteenth Amendment (incorporating the Fifth Amendment prohibition) there is a "public use" requirement conditioning the use of eminent domain power by a State. Even though the eminent domain power is coterminous with the police power of the State, it is the role of the courts to review a legislature's judgment of what constitutes a public use. The opinion noted that "the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without justifying public purpose, even though compensation be paid.'" *Id.* at 241.

On the other hand, the Court stated that the scope of review is narrow and that the Court will not substitute its judgment for that of the legislative body as to what constitutes a public use "unless the use be palpably without reasonable foundation." *Id.* In the final analysis, the Court held that the decision of the legislative

body is to be upheld "[w]hen the legislature's purpose is legitimate and its means are not irrational." *Id.* at 242-43.

Permitting an area to be taken by eminent domain because properties within it could be put to a higher economic use does not meet that test.

The blight surveys relied upon in this case by the PIEA found the project area (including Appellants' property) to be blighted based on "economic underutilization," a vague notion that because the property could be put to a higher economic use, it thus was blighted. Every bit of land in this entire nation could be put to a higher economic use. Land on which a new 50 story building stands could be put to a higher economic use by constructing a bigger and better building on it. Public lands, on which stand public buildings, such as art galleries or courthouses, or even public thoroughfares, could be put to a commercial—and thus higher economic —use. As Judge Prettyman observed in *Schneider v. District of Columbia,* 117 F. Supp. 705, 724 (D.D.C. 1953), *aff'd as modified sub nom. Berman v. Parker,* 348 U.S. 26 (1954):

> It would be difficult to think of a village, town or city in the United States which a group of artists, architects and builders could not improve vastly if they could tear down the whole community and rebuild the whole of it. But as yet the courts have not come to call such pleasant accomplishments a public purpose which validates Government seizure of private property. . . . One man's land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon

it a better house or a house which better meets the Government's idea of what is appropriate or well-designed.

When the standard applied is so broad as to be applicable to literally every piece of property in the nation, it is no standard at all. The condemnation of Appellants' property was accomplished "without adequate determining principle," *see United States v. Carmack*, 329 U.S. 230, 243 (1946), and thus offends the Fifth and Fourteenth Amendments.

CONCLUSION

For all the reasons stated above, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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April 15, 1988

APPENDIX

MISSOURI REVISED STATUTES

Sections 100.300-.310

100.300. Short title.—Sections of this law shall be known and may be cited as "The Planned Industrial Expansion Law".

* * *

100.310. Definitions.—As used in this law, the following words and terms mean:

* * *

(2) **"Blighted area"**, an area which, by reason of the predominance of defective or inadequate street layout, insanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals or welfare in its present condition and use;

* * *

(11) **"Insanitary area"**, an area in which there is a predominance of buildings and improvements which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation or open spaces, high density of population and overcrowding of buildings, overcrowding of land, or the existence of conditions which endanger life or property by fire and other

causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime or constitutes an economic or social liability and is detrimental to the public health, safety, morals or welfare;

* * *

(18) **"Undeveloped industrial area"**, any area which, by reason of defective and inadequate street layout or location of physical improvements, obsolescence and inadequate subdivision and platting contains vacant parcels of land not used economically; contains old, decaying, obsolete buildings, plants, stores, shops, shopping centers, office buildings, hotels and motels and parking garages, warehouses, distribution centers, structures; contains buildings, plants, stores, shops, shopping centers, office buildings, hotels and motels and parking garages, multi-family housing facilities, warehouses, distribution centers and structures whose operation is not economically feasible; contains intermittent commercial and industrial structures in a primarily industrial or commercial area; or contains insufficient space for the expansion and efficient use of land for industrial plants and commercial uses amounting to conditions which retard economic or social growth, are economic waste and social liabilities and represent an inability to pay reasonable taxes to the detriment and injury of the public health, safety, morals and welfare.

IN THE
CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI

CV85-26543
DIVISION NINE
CIVIL "M"

THE PLANNED INDUSTRIAL EXPANSION
AUTHORITY OF KANSAS CITY,
MISSOURI,
Plaintiff,

vs.

JAMES P. TIERNEY, et al.,
Defendant.

ORDER

On February 25, 1986, this matter came on for hearing. Plaintiff appears by its attorneys. The City of Kansas City appeared by its attorney. Defendant James P. Tierney appeared in person and as his own attorney. Defendants Catherine D. Tierney, George E. Tierney, Patricia D. Tierney, William J. Tierney, Gwen Tierney, Thomas F. Tierney, and Jane Tierney appeared by their attorney James P. Tierney. All other named defendants did not appear. All parties not appearing have been duly summoned or notified by service of process or publication. All parties appearing have been duly summoned or notified by service of process or publication.

Plaintiff presents its Second Amended Petition in Condemnation of certain land and property interests claimed by Defendants, and the Court having seen and considered

said Second Amended Petition in Condemnation, heard evidence, heard the tape recorded proceeding of meetings held by the City Plan Commission of Kansas City, Missouri on May 18, and June 15, 1982, and considered the briefs filed by the parties, finds that defendants' affirmative defense that the City Council of Kansas City, Missouri lacked a factual foundation in concluding that the PIEA's 16th and Central Area Development Plan conformed with the general plan for the development of the community as a whole is without merit. The City Council had available to it the files of the City Development Department. These files included an opinion letter from the City Plan Commission to the PIEA stating that the 16th and Central Area Development Plan conformed to the City's "general plan." The PIEA also advised the City Council in its Resolution No. 25 that the PIEA plan was in conformity with the City's general plan. The PIEA's opinion was based on four and one half years of planning for the redevelopment of the 16th and Central Area. Further, Mr. Richard Schoegler, Executive Director of the PIEA, advised the City Plan Commission on May 18, 1982 about the scope and purpose of the PIEA's 16th and Central Area Development Plan. Mr. Schoegler described the 16th and Central area, showing photographic slides of each affected building. He stated that the PIEA had worked closely with the city government, including biweekly meetings with the Economic Development Committee, in developing its plan for the 16th and Central Area. Finally, Mr. Schoegler explained the reasons for the proposed development of the 16th and Central Area, noting the PIEA's plan was an integral part of the current development of downtown Kansas City.

Accordingly, the Court finds that the City council did not act arbitrarily and without a factual foundation, and

that defendants failed to meet their burden of proof in showing that no reasonable person on the City Counsel could have concluded that the PIEA's 16th and Central Area Development Plan conformed with the City's general plan for the community as a whole. See *Allright Missouri, Inc. v. Civic Plaza Redevelopment Corporation*, 538 S.W.2d 320, (Mo Banc 1976).

The Court further finds that due notice of the pendency of the Second Amended Petition in Condemnation and of the time and place of this hearing duly and properly has been given to all parties named or described as Defendants in said Petition in Condemnation; that Plaintiff is authorized by law to condemn as set out in the Second Amended Petition in Condemnation; that Plaintiff has endeavored to agree with Defendants on the proper compensation to be paid for the lands and property rights sought to be appropriated, but that no agreement can be reached; that said lands and property rights are being condemned for public use and for the purposes set out in the Second Amended Petition in Condemnation; and that Plaintiff has complied with all requirements of law.

Additionally, defendant's Request for Opinion, filed March 4, 1986, is hereby overruled. Defendants' request is untimely. It was filed five days after the case was submitted to the Court for its ruling. Missouri Rules of Civil Procedure 73.01(a)(2).

IT IS THEREFORE ORDERED AND ADJUDGED that the lands and property rights described in the Second Amended Petition in Condemnation be condemned for the public purposes and uses as set forth in said Second Amended Petition in Condemnation, and that Plaintiff shall have the right to take possession and make use thereof

immediately upon payment to the Circuit Clerk of the amount, if any, which may be assessed in the Condemnation Commissioners' Report.

IT IS FURTHER ORDERED that CARL E. BOLTE, JR., ROBERT THANE JOHNSON and KEITH P. BONDURANT, (who are three disinterested Commissioners, freeholders and residents of Jackson County, Missouri, in which the lands and property rights herein condemned are situated), be and are hereby appointed Commissioners.

IT IS FURTHER ORDERED that the said Commissioners shall forthwith meet, qualify according to law, view the properties described in the petition, and duly return, under oath, to the Circuit Clerk such assessment of the damages which Defendants may sustain by reason of the appropriation, and setting forth and stating the amount of net damages allowed Defendants, together with a specific description of the property for which such damage was assessed. Said Circuit Clerk is ordered to file said Report, duly record the same in the order book of this Court and with the Jackson County Recorder of Deeds, and forthwith duly notify Defendants and the Plaintiff of the filing thereof.

/s/ H. Michael Coburn
H. Michael Coburn

7-22-86
Date
cc: All counsel of record

IN THE
CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI AT KANSAS CITY

Case No. CV85-26546
Civil M
Division 9

JAMES P. TIERNEY, et al.,
Plaintiffs,

v.

THE PLANNED INDUSTRIAL EXPANSION
AUTHORITY OF KANSAS CITY,
MISSOURI, et al.,
Defendants.

AMENDED ORDER

This matter comes on for hearing this 24th day of February, 1986. Plaintiffs and defendants appear by their counsel of record. At the request of counsel for plaintiffs, Thomas P. Tierney is added as a plaintiff without objection.

After consideration of oral argument made by counsel for plaintiffs and defendants, and examination of the briefs and authorities submitted by counsel, the Court hereby sustains Defendants' Motion for Reconsideration and dismisses Counts I and III. Plaintiffs' voluntary dismissal of Count II is sustained.

IT IS HEREBY ORDERED that this action including Counts I and III are dismissed with prejudice and Count II is dismissed without prejudice . . .

Dated this 27 day of February, 1986.

/s/ H. M. Coburn
Circuit Court Judge

NOTICE
THIS OPINION IS NOT FINAL UNTIL ALL POST HANDDOWN MOTIONS HAVE BEEN DISPOSED OF AND THE MANDATE ISSUED AND RECEIVED.

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD38633
Opinion Filed: March 31, 1987

STATE OF MISSOURI ex rel. JAMES P. TIERNEY, GEORGE E. TIERNEY, WILLIAM J. TIERNEY, and THOMAS F. TIERNEY,
Relators,

vs.

THE HONORABLE H. MICHAEL COBURN, Circuit Judge, and CARL E. BOLTE, JR., ROBERT THANE JOHNSON, and KEITH P. BONDURANT,
Commissioners,
Respondents.

ORIGINAL PROCEEDING IN PROHIBITION

Before Pritchard, J., Presiding; Shangler and Dixon, JJ.

This action for extraordinary relief arises from a suit for condemnation filed by the Planned Industrial Expansion Authority (PIEA) of Kansas City, Missouri. The PIEA, claiming power to condemn under "The Planned Industrial Expansion Law," §§ 100.300-.620, RSMo Supp. 1984,[1] filed a petition for condemnation to acquire relators'

1. The pertinent PIE statutes in effect at the time this case arose are set out in RSMo Supp. 1984. All statutory cites refer to RSMo Supp. 1984 unless otherwise designated.

property at 1500 Baltimore, Kansas City, Missouri. Relators sought a writ of mandamus, or in the alternative, a writ of prohibition to halt the condemnation proceedings. This court issued a preliminary writ of prohibition on August 26, 1986.

Aside from the inherent issue of the availability of the writ, the issues to be determined in this case are limited by the preliminary writ. Those issues are first, whether the PIEA development plan adopted by the City Council on September 28, 1982, sufficiently complies with §§ 100.300-.620, RSMo, to permit the condemnation and, second, whether the developer's plan approved by the PIEA on December 8, 1982, so substantially changed the PIEA plan as to constitute a violation of the statutory scheme, particularly of § 100.400.1(10), which requires legislative approval for a change in the plan.

Public activity concerning the area encompassing relators' property began several years ago. On June 15, 1978, the Kansas City City Council passed a resolution approving a development plan for the Downtown Industrial Area which includes relators' property. Also in 1978, the Kansas City Corporation for Industrial Development caused a survey to be made of the condition of the area from 15th to 17th Streets, Baltimore to Broadway. This survey found no substandard properties on Baltimore or Broadway.

Thereafter, Jerome Ogburn, President of PGAV/Community Resource Corporation, conducted a blight survey for the area from Central to Wyandotte, 15th to 17th Streets, known as the 16th and Central project area. He concluded that the 16th and Central project area was a blighted area, and this conclusion was corroborated in general terms at hearings before the City Plan Commission and the Zoning and Planning Committee of the City Council

by Whitney Kerr, a partner in Kerr-Andersen (K-A) Company, and Richard Schoegler, the Executive Director of the PIEA. At the request of the PIEA, the City passed an ordinance on August 18, 1981, declaring the 16th and Central project area to be one of the City's blighted, insanitary or undeveloped industrial areas.

Later, at the request of the PIEA, Ogburn and his firm expanded the blight survey to include the west side of Baltimore from 15th Street to 17th Street, as well as the east side of Broadway from 15th Street to 17th Street, so that the 1500 Baltimore property was included in the blighted area. He then found the entire area to be blighted, although no substandard buildings were found in the expansion area itself. At the request of the PIEA, the City Council, after recommendation by the City Plan Commission, passed an ordinance declaring an area that included the west side of Baltimore from 15th Street to the south line of 16th Street, and the east side of Broadway from 15th Street to 17th Street, as well as the area covered by the initial ordinance, to constitute a blighted, insanitary or undeveloped industrial area.

The PIEA then prepared a general development plan calling for solely commercial development of the area designated as blighted. The City Council approved PIEA's development plan in Ordinance No. 54369 on September 28, 1982. After advertising for redevelopment proposals, the PIEA approved a redevelopment proposal of K-A Company in December 1982.[2] This plan was neither submitted to nor approved by the City Council.

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2. Relators include a 1985 development proposal with their exhibits. The 1985 proposal differs from both the PIEA plan and the December 1982 redevelopment proposal. Since the record does not indicate that the 1985 proposal was ever approved by the City Council or the PIEA, it is not necessary to consider here the substantial changes the 1985 proposal makes in the PIEA plan.

On November 21, 1985, the PIEA adopted a resolution authorizing the commencement of condemnation proceedings against the 1500 Baltimore property. On November 27, 1985, the PIEA filed its petition for condemnation of the area. On that same day, relators filed an action for declaratory judgment contesting the right of the PIEA to take their property. The PIEA and other named defendants moved to have the petition dismissed. The motion was first overruled but after the PIEA moved for disqualification of the overruling judge, the case was transferred to Judge Coburn. Judge Coburn, upon a motion to reconsider, dismissed the petition for declaratory judgment with prejudice and proceeded with trial of the condemnation suit.[3] Five months after the trial of the condemnation suit, in July 1986, Judge Coburn sustained the petition for condemnation and appointed the commissioners to view the property. On August 20, 1986, relators filed their petition for extraordinary relief, and a preliminary writ of prohibition was granted on August 26, 1986.

The first issue to be determined necessarily is whether prohibition should be made available in cases such as this. Although "[t]he case law in this state concerning the use of prohibition is not totally consistent nor reconcilable," *State ex rel. Devanssay v. McGuire,* 622 S.W.2d 323, 325 (Mo. App. 1981), writs of prohibition have issued in condemnation cases.

Prohibition was used in *State ex rel. Gove v. Tate,* 442 S.W.2d 541, 542 (Mo. banc 1969), to prevent condemnation when the court found that in addition to a nonpublic purpose for the taking there was no ordinance authorizing the

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3. The dismissal of the petition for declaratory judgment was affirmed in *Tierney v. Planned Industrial Expansion Authority,* WD38208 (Mo. App. Feb. 10, 1987).

city to proceed with condemnation. In *State ex rel. Clothier v. Yeaman,* 465 S.W.2d 632, 634 (Mo. banc 1971), a writ of prohibition was issued when the court found it was "clearly evident" that an attempt was being made to condemn private property for a nonpublic use. Prohibition was also found to be an appropriate remedy in *State ex rel. Weatherby Advertising Co. v. Conley,* 527 S.W.2d 334, 341-342 (Mo. banc 1975), in which the respondent judge was found to lack jurisdiction to proceed with condemnation because the condemning authority had failed to comply with the statutory conditions precedent before filing its petition for condemnation. Finally, in *Devanssay,* 622 S.W.2d at 324, a preliminary writ of prohibition was issued to allow review of the landowners' allegation that the ordinance approving a Chapter 353, RSMo 1978, urban redevelopment plan and granting the redevelopment corporation the power of eminent domain was arbitrary and void because the plan did not contain the " 'detailed statement of the proposed method of financing the redevelopment' " required by the redevelopment enabling ordinance.

Devanssay provides an excellent discussion of the use of prohibition in condemnation proceedings and its reasoning is dispositive here.

As is pointed out in *Devanssay,* the court, in a condemnation proceeding, must first determine whether the condemnation is authorized by law. *Id.* at 325. A finding that the petitioner has the right to condemn is interlocutory only and is not appealable by the landowner at that point. *Id.; State ex rel. Clothier,* 465 S.W.2d at 634. Second, the landowner's damages resulting from the taking must be established. Commissioners are appointed to assess the landowner's damages and upon payment of the commissioners' award into the court, the condemning authority

acquires the property and may utilize it as prayed in the petition for condemnation. *Devanssay,* 622 S.W.2d at 325. Either party may contest the amount of the commissioners' award and request a jury trial to determine damages. *See Id.* Only after such trial has concluded is the case appealable. *Id.*

In many instances by the time an appellate court can determine that the taking was invalid, the condemning authority will have so changed the property that redress of the landowner is impossible. The *Devanssay* court concluded that in light of the nature of condemnation proceedings, "prohibition is a proper method to prevent such alleged injustice." *Id.* at 326.

Prohibition is the proper relief for relators to seek in this instance. If the proceedings do not comply with the statute, then the trial judge is without jurisdiction to order the condemnation to proceed. An appeal after the taking of the property and any demolition by the PIEA and the development company would be a totally futile and ineffective remedy.

The first issue within the scope of these writ proceedings is whether the ordinance approving the plan for the development was valid. The statute predicates the acquisition of real property upon the City Council's approval of the plan of the PIEA pursuant to § 100.400, RSMo. Under the specific direction of § 100.400.1(4):

> A plan shall be sufficiently complete to indicate its relationship to definite local objectives as to appropriate land uses, improved traffic, foster employment, public transportation, public utilities, recreational and community facilities and other public improvements

and the proposed land uses and building requirements in the project area, and shall include without being limited to:

(a) The boundaries of the project area, with a map showing the existing uses and condition of the real property therein;

(b) A land use plan showing proposed uses of the area;

(c) Information showing the standards of population densities, unemployment within area and adjacent areas, land coverage and building intensities in the area after completion of the plan;

(d) A statement of the proposed changes, if any, in zoning ordinances or maps, street layouts, street levels or grades, building codes and ordinances;

(e) A statement as to the kind and number of additional public facilities or utilities which will be required in the area after completion of the plan;

(f) A schedule indicating the estimated length of time needed for completion of each phase of the plan.

The plan submitted by the PIEA mentions all the matters set forth in the foregoing subsections. The question to be determined is whether the plan's language sets forth enough factual material to permit a determination that the plan complies with the statute.

In determining this question, the first and primary inquiry must be the intent and purpose of the legislature in drafting the statute to require that certain elements be included in the plan.

Because the whole issue in this case turns on the question of the propriety of the condemnation action, it is appropriate to consider the grant of condemnation authority in the light of the statute. The power of the state to condemn, and particularly the delegation of that power to corporations public and private, is viewed jealously, and its exercise carefully limited. *See Maryland Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284, 292 (Mo. App. 1979); *State ex rel. Terrell v. Nicholls*, 719 S.W.2d 862, 866 (Mo. App. 1986). In determining whether or not the power of condemnation exists under a given statute delegating the same to a public or private entity, the courts will examine the requirements of the statute with some care to determine that the condemnation power is appropriately delegated and exercised. *See Maryland Plaza Redevelopment Corp.*, 594 S.W.2d at 292; *State ex rel. Terrell*, 719 S.W.2d at 866. It is in the light of that overriding principle in eminent domain law that the particular statutory sections must be considered.

The passage of an ordinance by the City Council is a legislative act. *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635, 655 (Mo. banc 1965), *appeal dismissed*, 385 U.S. 5 (1966); *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11, 15, 19 (Mo. 1974). Such an act will ordinarily be deferred to by the courts but when the City Council has acted arbitrarily or as a result of fraud, collusion or bad faith, the City Council's decision need not be accepted by the courts. *State on Inf. of Dalton v. Land Clearance for Redevelopment Authority*, 364 Mo. 974, 989, 270 S.W.2d 44, 52 (banc 1954); *Annbar Associates*, 397 S.W.2d at 655; *State ex rel. Atkinson v. Planned Industrial Expansion Authority*, 517 S.W.2d 36, 45 (Mo. banc 1975).

No allegations of fraud or bad faith have been set forth here. The validity of the city ordinance in question turns on whether or not the ordinance was arbitrarily passed. If the City Council passed the ordinance approving the PIEA's redevelopment plan without any factual material in the plan or evidence before the Council to support a legislative determination of compliance with § 100.400, RSMo, then the ordinance is indeed arbitrary and void.

Turning now to the question of the ordinance and plan in the instant case, it should be noted that the ordinance itself does not contain any specific findings with respect to the matters contained in § 100.400.1(4), (a) through (f), set forth above. All of the verbiage concerning these matters is contained in the plan itself and the ordinance simply adopts the plan. It is apparent from the statute that its general purpose and intent is to require a legislative oversight of the plan developed by the agency. The plan must be approved by the City Council and every substantial change must likewise receive approval. The statute clearly requires the legislative body to find that the plan complies with the statute before the legislative body may approve the plan. The whole purpose of the statute would be thwarted if there was not a legislative determination of the validity and sufficiency of the plan prior to the development of the project. The legislature has seen fit to require legislative approval prior to acquisition of land or any other such implementation of a redevelopment plan.

Looking at the subsections of § 100.400.1(4), (c) through (e), subsection (c) requires:

> Information showing the standards of population densities, unemployment within an area and adjacent

> areas, land coverage and building intensities in the area after completion of the plan[.]

The plan "anticipates" that approximately 500,000 square feet of office space will be built in the project area. The only other language even remotely suggestive of the "information" required by subsection (c) is the following.

> Any specific development proposal approved . . . will contain among other things adequate provision for traffic, vehicular parking, safety from fire, adequate provision for light and air, sound desire and arrangement and improved employment opportunities. The plan is not expected to have any significant negative impact on adjacent traffic patterns or public transportation.

There is simply no factual material of any sort concerning standards of population densities, unemployment within the area and adjacent areas or land coverage after completion of the plan. The only exhibit that purports to demonstrate the area after the implementation of the plan, which was an attachment to the plan itself, is a sketch of the area showing the ground elevations and two proposed streets. There is not a shred of factual material nor evidence before the Council concerning the specific factual matters required by subsection (c).

Subsection (d) reads as follows:

> A statement of the proposed changes, if any, in zoning ordinances or maps, street layouts, street levels or grades, building codes and ordinances[.]

Again the plan itself contains absolutely no factual material concerning any proposed changes in zoning ordinances

or maps, street layouts, street levels or grades, building codes or ordinances. Regarding streets and zoning, the following language is all that appears:

> It is contemplated that major portions of Central and Wyandotte Streets and associated alleys will be vacated. Proposed new traffic corridors are shown on attached Exhibit 4 [proposed land use map]. Depending upon the nature of future development, it may be necessary to construct other streets or alter the location of the proposed traffic corridors.
>
> . . . . Given the proposed land uses of this plan, it is anticipated that the area will be rezoned to an appropriate planned commercial business district. Since it is not possible to anticipate the full extent of future development plans at this time, additional zoning changes may be necessary.

Again, this generalized language fails to provide any factual basis for a legislative determination.

Under subsection (e), the statute requires:

> A statement as to the kind and number of additional public facilities or utilities which will be required in the area after completion of the plan[.]

The plan recognizes that there may be relocation or abandonment of existing water lines as well as construction of new utilities. With respect to these matters, the plan specifically recites as follows: "The type and location of abandonment and/or relocation and/or construction of [water and sewer] lines, at this time, is impossible to determine." Thus, the plan itself simply denies that a statement as to the kind and number of additional

public facilities or utilities which will be required can be made. Obviously a part of the legislative determination made when such a plan is approved is a determination of the consequence of such approval on the overall utility system and scheme of the city and, in particularly on the area in question. The only purpose for the statute to require such factual matters in the plan is to permit the members of the legislative body to make an intelligent, informed and appropriate legislative decision with respect to approval of the plan. Absent such a factual basis, the legislative determination can only be arbitrary and capricious and without any factual foundation. The plan simply does not provide any factual basis for a determination by the City Council of the validity of the plan.

The second issue, the question of modification of the plan without Council approval, is likewise based upon the failure of the plan as presented by the PIEA to provide any specific frame of reference from which to measure any change in the plan from that proposed and approved by the City Council. Section 100.400.1(10) provides, "[w]here the proposed modification will substantially change the plan as previously approved by the governing body, the modification must similarly be approved by the governing body." That language is likewise recited in the ordinance itself. Both the approved plan and the redevelopment proposal of the K-A company are in evidence in this case. The K-A development proposal was approved by the PIEA on December 8, 1982, but has been neither presented to nor approved by the City Council. Comparison of the salient features of the K-A development proposal and the PIEA plan approved by the September 28, 1982, ordinance reveals that the

development proposal differs markedly from the PIEA plan. The PIEA plan only makes sketchy provision for access by new streets; the K-A plan substantially modifies existing streets and utilities and the proposals are quite different from those shown in the PIEA plan. The K-A proposal requires the development of a detailed utilities plan for new and upgraded utilities. There are detailed plans for structures for offices, retail shops, a hotel, and a major office building. None of this information is contained in the PIEA plan.

The foregoing is not intended as a criticism of the plan submitted by the K-A Development Company. It is submitted simply to show that the K-A development proposal makes very substantial changes from the general and nonspecific language of the PIEA plan which factually would provide an entirely different basis for a legislative determination. The exhibits attached to the K-A plan show very substantial departures from the existing situation as well as from the PIEA plan. Very substantial variations in the streets, sewers, and utilities are shown by the K-A plan. This is demonstrated by reason of the site plans and building location plans attached to the K-A plan which when compared with the original PIEA plan show that sewers and utilities would either be partially located under multi-story buildings or would require very substantial rerouting. There is simply no factual information as to the impact of these and other significant changes in the plan upon either the area itself, the City, or the adjacent areas. All of the foregoing leads inevitably to the conclusion that the K-A plan constitutes a substantial modification and departure from the PIEA plan. As such, it has not received the approval of the governing body, the City Council of Kansas City, Missouri, and the use of condem-

nation to implement the K-A plan will simply violate openly the requirement of the statute and the ordinance that such modifications in the plan receive legislative approval by the City Council of Kansas City, Missouri. For the foregoing reasons, the preliminary writ issued in this cause should be made absolute.

So ordered.

David J. Dixon,
Judge

All concur.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 38208
Opinion Filed: February 10, 1987

JAMES P. TIERNEY, GEORGE E. TIERNEY, WILLIAM J. TIERNEY and THOMAS F. TIERNEY,
Appellants,

vs.

THE PLANNED INDUSTRIAL EXPANSION AUTHORITY OF KANSAS CITY, MISSOURI, KANSAS CITY CORPORATION FOR INDUSTRIAL DEVELOPMENT, WHITNEY E. KERR, K-A COMPANY and THE CITY OF KANSAS CITY, MISSOURI,
Respondents.

Appeal From the Circuit Court of Jackson County
Honorable H. Michael Coburn, Judge, Division 9

Before Pritchard, P.J., Kennedy and Lowenstein, JJ.

While a suit was pending to condemn certain property of appellants, known as 1500 Baltimore Avenue, Kansas City, Missouri, they filed a three-count petition against respondents challenging the condemnation suit. Count I was for declaratory judgment on the allegations that Sections 100.300 to 100.620, RSMo 1978, are unconstitutional because they authorize the taking of property for private use; and the Act is unconstitutional as applied to appellants' property because the Blight and Plan Ordinances passed by the City pursuant to the Act were arbitrary and capricious. Count II was for a permanent injunction en-

joining all defendants from bringing eminent domain proceedings against plaintiffs' property; from enforcing Ordinance No. 54082 with respect to plaintiffs' property; and from continuing to include plaintiffs' property in the redevelopment project. Count III prayed for damages for tortious interference with the plaintiffs' property because of defendants designating it as a part of a blighted, unsanitary or undeveloped industrial area, and subjecting it to taking by eminent domain, thereby casting a cloud of blight thereon.

Appellants voluntarily dismissed Count II of the petition without prejudice. On motion for reconsideration of a previous judge's order overruling respondents' motion to dismiss, the trial court, after a motion for change of judge was sustained, dismissed Counts I and III with prejudice and Count II without prejudice.

As to the propriety of dismissing Count I, the threshold and dispositive issue is whether the remedy of declaratory judgment will lie to attack pending eminent domain proceedings in view of other adequate remedies at law. Respondents cite three cases holding that a declaratory judgment action may not be maintained to contest condemnation power, when there is pending a related condemnation suit in which the same issues may be presented and pursued on appeal or by extraordinary remedy. In Glueck Realty Company v. City of St. Louis, 318 S.W.2d 206 (Mo. 1958), the City sought to condemn appellant's property for off-street parking, and while that suit was pending, appellant brought suit to enjoin the City and its officials from carrying out the terms of city ordinances for acquisition of the property, and issuance of revenue bonds for that purpose and for construction, and for

declaratory judgment that the ordinances were invalid. The court noted that City of Kirkwood v. Venable, 351 Mo. 460, 173 S.W.2d 8 (Mo. 1943); and Kansas City, Missouri v. Aronson, 282 S.W.2d 464 (Mo. 1955), which had in them issues challenging the validity of eminent domain ordinances, were authority that those issues might be litigated in the condemnation suit. The Glueck opinion went on, page 211[1], "Where a plaintiff has an adequate remedy by law, he may not resort to a separate suit in a court of equity or the Declaratory Judgment Act, Section 527.010, et seq. RSMo. 1949, V.A.M.S., for redress. [Citing cases and authority.]" See also State ex rel. Schwab v. Riley, 417 S.W. 2d 1, 5[15] (Mo. banc 1967), "However, it would appear that all of those alleged matters which have any direct relationship to the condemnation case may be asserted in the answer as defenses therein"; and, for a like holding, see Lia v. Broadway/Olive Redevelopment Corporation, et al., 647 S.W.2d 189, 191 (Mo. App. 1983).

In appellants' cited cases of Schweig v. Maryland Plaza Redevelopment Corp., 676 S.W.2d 249 (Mo. App. 1984); Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp., 538 S.W.2d 320 (Mo. banc 1976); and Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11 (Mo. 1974), no condemnation suit was filed or pending when the declaratory judgment suits were filed. In State ex rel. Devanssay v. McGuire, 622 S.W.2d 323 (Mo. App. 1981), although there was a condemnation suit pending, it was held that a writ of prohibition (there quashed) to determine the validity of the taking was proper. That is a situation not dissimilar to the application in this court for writ of mandamus or prohibition, now pending, and in which many of the

same issues as here are presented, State ex rel. Tierney, et al., v. Coburn, No. WD 38633. In State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis, 517 S.W.2d 36 (Mo. banc 1975), a quo warranto action was filed before any condemnation proceedings were begun to determine the constitutionality of the PIEA Act. These cited cases do not support appellants' contention. It follows that the trial court did not err in dismissing the declaratory judgment count because there exist other adequate remedies at law. Of course, it must be said that if the declaratory judgment action did lie, this court would have no jurisdiction to determine the validity or invalidity of the statutes in question. Because the action is held herein not to lie, the constitutional question is not reached.

This leaves the dismissal of Count III, sounding in tort, for consideration. In support of the motion to dismiss of K-A Company and Whitney E. Kerr, the latter's affidavit is attached by which it is stated that neither he nor K-A Company "(1) passed the 'Planned Industrial Expansion Authority Law' of Missouri, RSMo §§ 100.300-100.620 (1978), or Ordinance Nos. 53137, 54082 and 54369 of the City of Kansas City, Missouri, which plaintiffs mention in Count I of their Petition; (2) instituted the condemnation action which plaintiffs seek to enjoin in Count II of their Petition; or (3) passed Ordinance No. 54082 (or any other ordinance) of the City of Kansas City, Missouri, which plaintiffs mention in Count III of their Petition." It is also stated that Whitney E. Kerr is the managing general partner of the K-A Company which is the designated developer of the 16th and Central redevelopment project of the PIEA of Kansas City, Missouri. The affidavit stands uncontroverted, thus the facts

being admitted, and it thereby appears that neither Whitney E. Kerr nor K-A Company committed any act which would be actionable in tort to appellants. The motion to dismiss with attached affidavit was filed on January 8, 1986, and appellants have had ample opportunity to controvert the facts stated in the affidavit, but have not done so. In such situation, the motion to dismiss will be treated as one for summary judgment. Ruzicka v. Universal Printing Co., 637 S.W.2d 834, 835 (Mo. App. 1982); Boyer v. Carondelet Sav. & Loan Assn., 633 S.W. 2d 98, 100, n.2 (Mo. App. 1982); Henley v. Continental Cablevision of St. Louis County, Inc., 692 S.W.2d 825 (Mo. App. 1985); and Black Leaf Products Co. v. Chemisco, Inc., 678 S.W.2d 827 (Mo. App. 1984). The trial court did not err in dismissing the claim alleged in Count III as to Whitney E. Kerr and K-A Company.

As to PIEA, § 100.390, RSMo 1978, provides that it "shall constitute a public body corporate and politic, exercising public and essential *governmental functions* and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this law * * *." [Italics added.] Because its functions are governmental, it enjoys sovereign immunity from suits sounding in tort. The allegation does not come within either of the two exceptions to immunity in § 537.600. Appellants merely allege that PIEA is liable in tort for a decrease in the market value of their property occasioned by the condemnation suit. The same considerations apply to respondent City of Kansas City, Missouri, which is also immune in enacting ordinances in a governmental capacity. The trial court did not err in dismissing Count III as to PIEA and the City of Kansas City on the ground of sovereign immunity.

The propriety of the motion to dismiss of respondent Kansas City Corporation for Industrial Development rests upon the same ground as that of Whitney E. Kerr and K-A Company, supra. KCCID's Executive Vice President Martin Orr attached his affidavit to its motion stating that it did not pass any statutes or ordinances relating to the condemnation action. The affidavit was uncontroverted, and thus the motion is likewise treated as one for summary judgment under the same cases cited above, and no act therefore remains which could be the basis for KCCID's liability in tort.

The judgment is affirmed.

All concur.

Jack P. Pritchard,
Presiding Judge

(Filed December 15, 1987)

SUPREME COURT OF MISSOURI
EN BANC

No. 69317
Appeal From the Circuit Court of Jackson County
The Honorable H. Michael Coburn, Judge

JAMES P. TIERNEY, et al.,
Appellants,

vs.

THE PLANNED INDUSTRIAL EXPANSION AUTHORITY OF KANSAS CITY, MISSOURI, et al.,
Respondents.

(Consolidated with)

No. 69528
Original Action in Prohibition

STATE ex rel. JAMES P. TIERNEY, et al.,
Relators,

vs.

THE HONORABLE H. MICHAEL COBURN,
Circuit Judge, et al.,
Respondents.

OPINION IN CONSOLIDATED ACTIONS

The Dispute

The Tierneys, plaintiffs in 69317 and relators in 69528, are the owners of land at 1500 Baltimore in downtown

Kansas City, containing a structurally sound and usable building. The Planned Industrial Expansion Authority of Kansas City, Missouri (PIEA) instituted condemnation proceedings in accordance with Chapter 100, RSMo. The owners filed suit against PIEA and others seeking a declaratory judgment that the condemnation proceedings were invalid and also damages on account of "condemnation blight." Following hearing, the trial judge overruled the owners' challenge to the condemnation proceedings. He had previously dismissed the three-count petition in the civil action, but allowed the owners to raise all their objections in the condemnation hearing. The owners then sought prohibition or mandamus in the Missouri Court of Appeals, Western District. That court issued a preliminary rule in prohibition which it made absolute after argument, concluding that PIEA had not complied with certain mandatory requirements of the statutes and therefore had no power to go forward with the condemnation proceedings. Another panel affirmed the judgment of dismissal of the declaratory judgment action, on the ground that the writ remedy was adequate. We granted transfer in both cases because of the important issues involved. We now quash the preliminary rule in prohibition and affirm the judgment of dismissal.

In 1967 Missouri adopted the Planned Industrial Expansion Act, Section 100.310, et seq., RSMo 1986. The act provides for the establishment of the Planned Industrial Expansion Authority of Kansas City, Missouri (PIEA) as a body corporate and politic, having the authority to acquire land in "blighted", "insanitary" or "undeveloped industrial" areas, 100.310(2), (11), (18), RSMo 1986, by eminent domain if necessary, and to dispose

of the land to redevelopers, in accordance with redevelopment plans, with approval at various stages by it and by the City Council of Kansas City. We are commanded by Section 100.610 to construe the act "liberally to effectuate the purposes of the law."

On August 13, 1981, the City Council enacted an ordinance designating a tract bounded by both sides of Wyandotte and Central, between I-70 (15th Street) on the north and 17th Street on the south, as a "blighted, insanitary or undeveloped industrial area." This ordinance did not include the Tierney property.

On July 22, 1982 the council enacted another ordinance designating as blighted[1] the area covered by the 1981 ordinance, together with a tract to the west not involved in these proceedings, and a tract to the east consisting of the west side of Baltimore Avenue between I-70 (15th Street) and 16th Street and containing the Tierney property. The entire tract covered by the 1982 ordinance contains 22.7 acres.

On September 28, 1982, the council enacted an ordinance approving a General Development Plan submitted by PIEA for the area covered by the 1982 ordinance. The plan had been previously considered and approved by the City Plan Commission. This ordinance recited the existence of a "general plan for the development of the community as a whole," and contained the finding that the PIEA plan was in conformity with the general plan.

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1. For economy we will use "blighted" as a collective term for land meeting any of the statutory tests of "blighted," "insanitary," or "undeveloped industrial." Section 100.310(2), (11), (18).

On December 8, 1982, PIEA accepted a contract proposal by K-A Company for the redevelopment of the area. The owners contend that this proposal substantially changed the development plan as approved by the City Council the previous September, to such an extent that it invalidated the prior approval.

On November 21, 1985, PIEA adopted a resolution authorizing the commencement of condemnation proceedings. On November 27, 1985, it filed a petition for condemnation of the area covered by the 1982 ordinance. The declaratory judgment action was filed a few minutes later. The court held a hearing on the condemnation petition and, after substantial deliberation, entered an order on July 22, 1986 sustaining the petition in condemnation and appointing commissioners. The relators filed a prompt petition in the court of appeals seeking mandamus or prohibition. Timely notice of appeal in the civil action had previously been filed.

Challenges to Eminent Domain Proceeding

In *State ex rel. Washington University Medical Center Redevelopment Corporation v. Gaertner,* 626 S.W.2d 373 (Mo. banc 1982) we held that a landowner could not file a counterclaim in a condemnation action. This ruling poses a problem as to how an interested person may challenge the legality of an attempted condemnation in the appellate courts. If the trial court upholds the condemnation then the condemnor may take possession on paying the damages assessed by the commissioners and the property may be irreversibly altered before the case can be heard by the appellate courts.

There are cases in which the lawfulness of the condemnation has been determined in a prohibition pro-

ceeding.[2] To succeed the relator must show that the condemnation proceedings are unauthorized by law. If so, the trial court lacks subject matter jurisdiction. When the disputes are essentially factual the claim of lack of jurisdiction is extremely difficult to sustain because the trial judge has the authority to resolve fact issues in the hearing on the condemnation petition. Issuance of a preliminary rule in prohibition, furthermore, is solely within the discretion of the appellate court.

It is also possible to file a civil action against the condemning agency seeking injunctive or declaratory relief.[3] This may provide a factual record, but unless the plaintiff owner is successful in the trial court there is no assurance that the condemnor will not take possession and alter the property before the appeal can be pursued. Matters of interim relief, in the form of temporary injunction, stay, or expediting of the appeal, require the exercise of judicial discretion.

There is no sure way to assure the owners a full dress appeal, in advance of the taking. If the trial court decides against them they may often have to be content with the "just compensation" the law requires. In this case, however, there is a factual record which we may resort to in determining the legal issues in both pro-

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2. *State ex rel. Devanassy v. McGuire*, 622 S.W.2d 323 (Mo. App. 1981), containing an instructive exposition of the problems of a landowner who would challenge the propriety of eminent domain proceedings; *State ex rel. Weatherby Advertising v. Conley*, 527 S.W.2d 334 (Mo. banc 1975), *overruled on other grounds State ex rel. Missouri Highway and Transportation Commission v. Anderson*, 735 S.W.2d 350 (Mo. banc 1987).

3. *Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp.*, 538 S.W.2d 320 (Mo. banc 1976) *cert. denied*, 429 U.S. 941 (1976); *Parking Systems Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11 (Mo. 1974).

ceedings. We conclude that the condemnation is not illegal for the reasons assigned.

The Finding of Blight

The owners argue that their property was not shown to be "blighted", "insanitary", or "undeveloped", and that it could not be properly included in the area covered by the ordinance, by reason of *Mo. Const. Art. I, Sec. 28*, prohibiting the taking of private property for private use.

They do not challenge the basic concepts underlying urban redevelopment, as recognized by *State ex rel. Land Clearance Authority v. Dalton*, 270 S.W.2d 44 (Mo. banc 1954) and confirmed by numerous later decisions.[4] If the proper findings are made by the legislative authority, land may be acquired for redevelopment or industrial expansion and sold to other private interests, even though the owners are not willing to sell. Naboth may not always retain his vineyard, but must sometimes be content with just compensation. Ahab need not resort to major force, but may simply file a petition and pay the award. I Kings 21. Redevelopment of "blighted, substandard or insanitary" areas is a public purpose. Mo. Const., Art. I, Sec. 21. Whether a particular area is blighted, furthermore, is a matter for the legislative body to resolve.[5] Its authority controls unless its decision is shown to be so arbitrary and unreasonable as to amount

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4. *See particularly, Annbar Associates v. West Side Redevelopment Co.*, 397 S.W.2d 635 (Mo. banc 1965) *app. dismissed* 385 U.S. 5 (1966); *State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis*, 517 S.W.2d 36 (Mo. banc 1975), sustaining the law now before us.

5. *See generally*, Annotation, *What Constitutes a "Blighted Area Within Urban Renewal and Redevelopment Statutes,"* 45 A.L.R.3d 1096.

to an abuse of the legislative process. *Allright Missouri, Inc. v. Civic Plaza Redevelopment Corporation,* 538 S.W. 2d 320 (Mo. banc 1976).

The owners do not challenge these basic principles. They assert rather that the legislative findings in the case before us are so arbitrary and unreasonable that they cannot supply the jurisdictional base for eminent domain. Their property was not included in the 1981 ordinance, declaring a smaller tract to be blighted, but was included in a 1982 ordinance which added only unblighted property along the east side of Broadway and the west side of Baltimore. They argue that the addition of this unblighted property, without the required finding that the addition is necessary to attract redevelopers, contravenes the constitution and the statutes.

They do not challenge the proposition, established in *State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis,* 517 S.W.2d 36 (Mo. banc 1975) and confirmed in other cases such as *Allright Missouri, Inc. v. Civic Plaza Redevelopment Corporation, supra,* that a blighted area may include parcels which are not themselves blighted if these parcels are necessary to provide a tract of sufficient size or accessibility to attract redevelopers. They say that the principle may be invoked by the addition of property only if there is an explicit finding of necessity, citing *Prudential Building and Land Association v. Urban Renewal Community Development Agency of Louisville,* 464 S.W.2d 629 (Ky. 1971).

We do not agree. The city council is entitled to consider the area as a whole. Its authority is not limited simply because a part of the area covered by a proposed ordinance has already been declared blighted. Nor do

the governing statutes or ordinances require an explicit finding to support the inclusion of properties which are not blighted. The conclusion that all included properties are reasonably necessary for the redevelopment of the area is implicit in the declaration of blight. We do not find the Kentucky case persuasive.

The owners next attack the legislative finding of blight, pointing out that 27% of the area found to be blighted consists of streets and alleys, and 37% of surface parking. They point out that when these figures are added to the more than 50% of the buildings which are sound structures the greater part of the property in the area cannot properly be described as blighted.

Even if we assume that an area may not be said to demonstrate a "predominance" of blight unless more than half of the ground area is blighted, the owners' argument is not sound. Streets and alleys exist to serve the adjoining properties, and partake of the character of these properties. Surface parking constitutes a two-dimensional use which inhibits other, more economically intense, uses. Streets and parking lots consume valuable urban land. The legislative authority may properly find that they contribute to a condition of blight. *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corporation*, 518 S.W.2d 11 (Mo. 1974), is helpful on this issue.

The owners, finally, attack the concept of "economic underutilization" as a basis for condemnation. They suggest that almost all land could be put to a higher and better use, and argue that the concept of economic underutilization is so broad as to confer upon the legislative authority and PIEA the unlimited discretion to take one

person's property for the benefit of another, contrary to *Mo. Const., Art. I, Sec. 28.*

We do not find the fault or the danger perceived. The concept of urban redevelopment has gone far beyond "slum clearance," and the concept of economic under-utilization is a valid one. This is explicit in *State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis,* 517 S.W.2d 36 (Mo. banc 1975), sustaining the statutes governing this case. Centrally located urban land is scarce. The problems of assembling tracts of sufficient size to attract developers, and of clearing uneconomic structures, are substantial and serious. The willingness of the owners to sell is not controlling. We need not repeat all of the evidence which was before the city council tending to show that redevelopment of this area could promote a higher level of economic activity, increased employment, and greater services to the public. Industrial development is a proper public purpose. We do not sit as a court of appeal over the decisions of the council. The burden is on the owners to show that the finding of blight constitutes an arbitrary or unreasonable abuse of the legislative authority. They have not made this showing. *See, Allright Missouri, Inc. v. Civic Plaza Redevelopment Corporation,* 538 S.W.2d 320 (Mo. banc 1976).

Absence of a General Plan

The owners argue that PIEA may not proceed to acquire their land by eminent domain because of failure of compliance with Section 100.400-1(3), RSMo 1986, providing as follows:

> An authority shall not recommend a plan to the governing body of the city until a general plan for the development of the city has been prepared.

If this contention has merit, it precludes all activity under the planned industrial expansion statutes until the city has adopted a general plan. We therefore consider the point before taking up the objections to the particular plan. The claim, however, is not well taken.

The owners concede that a City Master Plan was adopted in 1947. They point out, however, that Kansas City has greatly expanded its boundaries since that time. The present boundaries of the city are divided into 46 planning areas. Supplemental area plans exist for no more than 30 of these areas including the 1978 Downtown Area Plan, No. 14, which includes the Tierney property. The owners argue that the failure to extend the master plan to the remaining areas is a fatal defect, contending that a "general plan" must include the entire city.

The owners do not satisfy us that there is a violation of the general plan requirement. The area here in question adjoins the downtown business district. It is in the oldest portion of the city, at its very heart. The conditions on which the 1947 plan was based remain essentially unchanged. The city maintains a City Plan Commission with a professional staff, and also has the services of the staffs of the Land Clearance for Redevelopment Authority and of PIEA. There is no showing that the absence of plans for some outlying areas rendered the 1947 plan and the supplemental area plans any the less useful. The city authorities are entitled to exercise some discretion in the use of their resources,

and might well conclude that some of the annexed areas were relatively stable, or not appropriate for industrial development, so that area plans were not priority items.

The text of the statute does not support the owners' claim, and we do not believe that it was intended that planned industrial development stand still until every square foot within the city limits is covered by a plan.

Conformity to the General Plan

Section 100.400-1(a), RSMo 1986, provides that the governing body of the city may approve a plan if it finds that the plan is "in conformity with the general plan for the development of the community as a whole."

Both the City Plan Commission and the City Council made the required findings. The owners argue, nevertheless, that the Downtown Industrial Area Plan of 1978 recommends that the land use for the area should remain "light industrial," and specifically rejects "core type uses, such as retailing, offices, and high density housing." That plan goes on to suggest that "high intensity core type uses, such as high-rise office, apartment and intense retailing should not be allowed so as not to detract from the economic revitalization of the Central Business District or the development of Crown Center and Pershing Square."

Relators point out that the PIEA plan makes provision for land use in the area as follows:

> Proposed land uses within the project area shall be limited to facilities relating to commercial use such as office buildings, financial institutions, hotels, motels, parking structures, commercial support services and ancillary uses.

We find no disabling disharmony between the 1978 plan and the uses proposed in 1982. Under the city's zoning ordinances "commercial" zoning is "higher" than light industrial zoning, and the classifications are cumulative, so that commercial uses are permissible in a light industrial area. Planning is a continuing process, and a plan cannot remain static or inviolate. The City Plan Commission and the City Council are charged with the responsibility for comparing the PIEA proposal to the preexisting plans and determining whether there is substantial compliance. To the extent that there are differences, we must assume that the duly constituted authorities concluded that the preexisting plans should be modified. The owners would introduce inflexibility and invite close judicial scrutiny, in a way not contemplated by the governing legislation.

Compliance With Statutory Requirements

Section 100.400 sets out certain factual information which must be included in every plan. This information includes population and employment data for the relevant area; zoning proposals; information on necessary street and utility changes and projected figures on the amount of building construction. Examination of the plan itself shows that these requirements were substantially complied with. The plan specifically states that the population density of the area is .83 persons per acre and that the unemployment rate is 17.2%. The plan includes a specific estimate that 500,000 feet of office space would be built. It also states expressly that a change in zoning from M-1 to planned commercial was contemplated. It says that no changes in the existing sewer or water systems are foreseen, and that existing building codes

and ordinances shall apply within the plan area. Exhibits attached to the plan contained graphic layouts which superimposed planned street configurations over existing streets. The plan, in short, contained the essential information which would permit members of the city council to make an intelligent, informed and appropriate legislative decision regarding approval of the plan. It is evident from the record that the council was assisted in its evaluation of the plan by several city agencies specifically charged with insuring the efficient and productive development of the city as a whole. The statutory requirements were devised to further this purpose. They should not be read as requiring that the council be informed of the precise placement of every brick before the duly appointed authority is even allowed to commence proceedings to acquire the property, and before the plan can be tendered to potential developers for bidding. The council had the means of information necessary for a studied decision.

The owners place strong reliance on *State ex rel. Maryland Plaza Redevelopment Association v. Greenberg*, 594 S.W.2d 284 (Mo. App. 1979), holding that an ordinance approving the redevelopment plan of a private developer was invalid and insufficient to confer the power of eminent domain because the plan did not provide the Board of Aldermen with the required information as to the method of financing. The case is not very close to this one. There the land was to be acquired by a private redevelopment corporation organized under Chapter 353, RSMo, which would be responsible for paying any judgment ultimately rendered in favor of the owners. The financial resources of the developer were of vital importance, but the plan submitted gave virtually no in-

formation on this score. The holding has perhaps been somewhat qualified in *State ex rel. Devanssay v. McGuire,* 622 S.W.2d 323 (Mo. App. 1981), which appears to relax the requirements for detailed financial information, and holds that the legislative body's conclusion that adequate information has been furnished is entitled to substantial weight.

The owners cite *State ex rel. Terrell v. Nicholls,* 719 S.W.2d 862 (Mo. App. 1986) for the proposition that failure of compliance with the enabling ordinance will deprive the redeveloper of the power to condemn.

Terrell also involved a Chapter 353 private redevelopment corporation. The corporation failed to notify propertyowners of the terms of the redevelopment plan within ninety days of approval by the Board of Aldermen, as expressly required by the governing ordinance. The court of appeals held that this failure precluded the redevelopment corporation from exercising the power of eminent domain. The notification requirements were designed to give the owners the opportunity to redevelop their own property. The express violation of the ordinance deprived them of this opportunity. No such deprivation occurred in the present case. There has been no suggestion that the owners in this case were denied their statutory right to propose their own redevelopment plan. Section 100.310.9, RSMo 1986. As our earlier discussion indicates, furthermore, the plan submitted to the council in this case is not lacking in essential information, in the manner of the plan criticized in *Greenberg.*

Modification of the Plan

Relators complain that, even if the PIEA plan approved by the council complies with the statutory re-

quirements, that plan was substantially modified by the proposals of the private contractor ultimately adopted by the PIEA. The proposal changed the configuration of several streets and called for an office building on relator's property rather than a hotel as originally contemplated. The argument fails to take account of the time sequence established by the statute. The city council approval of September 28, 1982, furnished the jurisdictional basis for acquisition of the property in the blighted area. This came before the plan was made available to developers for bidding. Jurisdiction is not lost because of what PIEA and the developers may later agree upon. Nor are the owners specially aggrieved by changes made after their property has become subject to condemnation.

It could hardly be expected that all details for the planned development could be spelled out at the time of council approval, or even at the time the initial contract is agreed to. There is no way to determine which potential developers might show interest, or what kind of development they might consider economic. Changes may be necessary to meet changing economic conditions, if uses contemplated in the initial plan are adequately provided by other new construction. We will not read the statutes in such a way as to frustrate their effectiveness, especially in view of the legislative command that they be construed "liberally to effectuate the purposes." Section 100.610. We are not persuaded that the modifications relied on by the owners represent a significant departure from the plan approved by the council. A "substantial modification" as described by Section 100.400 (10), such as to require council approval, should be read as referring to a modification which would substantially

alter the nature of the contemplated development. We find nothing of this sort in the record.

The city council retains ultimate control over the plan and any modifications. Section 100.400(10). The circumstances relied on by the owners do not divest the circuit court of jurisdiction over the eminent domain proceedings.

The Damages Claim

We conclude that the trial court properly dismissed Count III of the civil action, which sought damages for "condemnation blight," on the basis of the suggestion in *State ex rel. Washington University Medical Center Redevelopment Corporation v. Gaertner*, 626 S.W.2d 373 (Mo. banc 1982). The defendants are the city, the Planned Industrial Expansion Authority of Kansas City, Missouri, K-A Company (the developer), Whitney Kerr, one of the partners in the developer, and Kansas City Corporation for Industrial Development, a not-for-profit corporation whose role is not precisely stated. There are obstacles to the claims against each of these defendants.

Relief against the city is sought because of the passage of the blighting ordinance and the ordinance approving the initial redevelopment plan as submitted by PIEA. There is no precedent for holding a city liable for the actions of its governing body in adopting ordinances authorized by the planned industrial expansion act, which calls for the exercise of legislative judgment. The bare declaration of conditions found to exist in an area does not meet any accepted definition of "taking." When a blighting ordinance is passed, furthermore, there

is no assurance that a developer will be found or that development will ever proceed.

The claim against PIEA is based on its recommendation of the blighting and plan approval ordinances to the city council following its staff studies, and on its approval of K-A Company as a developer. PIEA is "a public body corporate and politic . . . exercising public and essential governmental functions." Section 100.310 (1), RSMo. Its duties consist of preparing general redevelopment plans for submission to the city council and considering proposals submitted by developers for the redevelopment of areas found to be blighted. The owners seek to hold it civilly liable simply for performing its statutory functions. We likewise are aware of no precedent for this. Section 100.520, indeed suggests substantial limitations on the civil liability of the authority.

The developer and Kerr have no governmental powers at all and do not possess the power of eminent domain. They are sought to be held simply for entering into a contract with PIEA on a matter within that agency's statutory authority. In doing this they violate no duty which they owe to the owners. No basis for the claim against the other defendant, Kansas City Corporation for Industrial Development, is suggested in the briefing.

It is apparent that the process of planned industrial development would be greatly inhibited if the governmental and private participants were held to the kind of liability sought to be imposed by Count III of the petition. We conclude that this count states no claim on which relief can be granted.

Washington University Medical Center, supra, involved a claim against a private urban redevelopment

corporation established by Chapter 353, RSMo 1978. What the Court said about the possibility of such a claim in a separate action was obiter, because the actual holding was that a claim for "condemnation blight" could not be made by way of counterclaim in the condemnation action. A claim against a private corporation is free from some of the immunity problems that are present in this suit. The case relied on, therefore, does not furnish substantial precedent for these plaintiffs. The facts alleged in Count III, furthermore, seem substantially different from those alleged in the counterclaim in that case, in which the dominant theme was loss of rental income.

The owners also cite *Roth v. State Highway Commission,* 688 S.W.2d 775 (Mo. App. 1985). The essential charge in that case was that the highway commission interfered with the rights of propertyowners by interceding with municipalities to frustrate the owners' attempts to get building permits, long before it instituted condemnation proceedings. The petition in effect charged that there had been a taking by the acts of agents of the condemning agency, which triggered the right to just compensation, before the processes of law were called upon to condemn the property. No claim of this sort is presented by Count III, which seeks relief based on the public acts of the defendants rather than on any interference with the owners.

Any action of the kind sought to be maintained in Count III must be on a theory that there has been a "taking." Such actions are sometimes referred to as actions for "inverse condemnation," and may be maintained in spite of sovereign immunity to fulfill the con-

stitutional command that property not be taken without just compensation. *Mo. Const. Art. I, Sec. 26. See Owen v. City of Springfield,* ..... S.W.2d ..... (Mo. banc 1987) (No. 69054, decided November 17, 1987, Rendlen, J., dissenting). The petition and other papers in this case do not state facts showing a taking, up to this point. There has been no abatement of the owners' rights in the property, which is leased through 1991. The owners, indeed, seek to forestall the acquisition by arguing that PIEA has no right to acquire the property, and have caused postponement of the taking up to this time by suing out an extraordinary writ.

After the Commissioners' award is filed, PIEA may "take" the property by paying the amount of the award into court. Both the owners and PIEA have the right for the review of that award by a jury. There is also the right to abandon the acquisition proceedings. S.Ct. Rule 86.06. Until the ultimate condemnation award is determined there can be no accurate determination as to whether there has been a taking, in advance of the statutory taking, which has not been adequately compensated.[6] Further consideration of the owners' entitlement, if any, should be postponed until that time. We express no opinion as to what kind of action might be brought, what showing is required, or whether any facts warranting relief appear in this record.[7]

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6. There may be multiple takings as a part of the same acquisition proceeding. *Missouri Highway and Transportation Commission v. Eilers,* 729 S.W.2d 471 (Mo. App. 1987).

7. *See* Castle, Note, *"Condemnation Blight: Compensating the Landowner in Missouri,"* 48 Mo. L. Rev. 220 (Winter, 1983); Dunkin, Note, *"Denial of Landowner's Counterclaim: Another Obstacle on the Road to Just Compensation,"* 50 UMKC L. Rev. 353 (Fall, 1981).

The judgment in Case No. 69317 is affirmed. The preliminary rule in Case No. 69528 is quashed.

Charles B. Blackmar,
Judge.

Billings, C.J., Rendlen, Higgins, JJ. and Morgan, Sr.J., concur; Welliver, J., dissents in separate opinion filed; Donnelly, J., dissents and concurs in separate dissenting opinion of Welliver, J. Robertson, J., not sitting.

(Filed December 15, 1987)
SUPREME COURT OF MISSOURI
EN BANC

No. 69317

JAMES P. TIERNEY, et al.,
Appellants,

v.

THE PLANNED INDUSTRIAL EXPANSION AUTHORITY OF KANSAS CITY, MISSOURI, et al.,
Respondents.

(CONSOLIDATED WITH:)

No. 69528

STATE ex rel. JAMES P. TIERNEY, et al.,
Relators,

v.

THE HONORABLE H. MICHAEL COBURN,
Circuit Judge, et al.,
Respondents.

DISSENTING OPINION

I respectfully dissent.

Our jurisdiction to transfer cases from the court of appeals is set forth in Mo. Const. art. V, § 10.

> Cases pending in the court of appeals shall be transferred to the supreme court . . . because of the

> general interest or importance of a question involved in the case, or for the purpose of reexamining the law, or pursuant to supreme court rule.

Rule 83.03 provides:

> In any case in which a motion for rehearing has been overruled and an application for transfer under Rule 83.02 has been denied, the case may be transferred by order of this court on application of a party for any of the reasons specified in Rule 83.02, or for the reason that the opinion filed is contrary to a previous decision of an appellate court of this state.

The reasons for transfer specified in Rule 83.02 are: "because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law." We should not transfer a case to substitute our view of the facts.

I adopt the opinion of the Western District Court of Appeals as my dissenting opinion. The opinion authored by David J. Dixon, Judge in cause No. WD38633 and concurred in by Pritchard, J., Presiding and Shangler, J., follows verbatim.

"This action for extraordinary relief arises from a suit for condemnation filed by the Planned Industrial Expansion Authority (PIEA) of Kansas City, Missouri. The PIEA, claiming power to condemn under "The Planned Industrial Expansion Law," §§ 100.300-.620, RSMo Supp. 1984,[1] filed a petition for condemnation to acquire

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1. The pertinent PIE statutes in effect at the time this case arose are set out in RSMo Supp. 1984. All statutory cites refer to RSMo Supp. 1984 unless otherwise designated.

relators' property at 1500 Baltimore, Kansas City, Missouri. Relators sought a writ of mandamus, or in the alternative, a writ of prohibition to halt the condemnation proceedings. This court issued a preliminary writ of prohibition on August 26, 1986.

"Aside from the inherent issue of the availability of the writ, the issues to be determined in this case are limited by the preliminary writ. Those issues are first, whether the PIEA development plan adopted by the City Council on September 28, 1982, sufficiently complies with §§ 100.300-.620, RSMo., to permit the condemnation and, second, whether the developer's plan approved by the PIEA on December 8, 1982, so substantially changed the PIEA plan as to constitute a violation of the statutory scheme, particularly of § 100.400.1(10), which requires legislative approval for a change in the plan.

"Public activity concerning the area encompassing relators' property began several years ago. On June 15, 1978, the Kansas City City Council passed a resolution approving a development plan for the Downtown Industrial Area which includes relators' property. Also in 1978, the Kansas City Corporation for Industrial Development caused a survey to be made of the condition of this area from 15th to 17th Streets, Baltimore to Broadway. This survey found no substandard properties on Baltimore or Broadway.

"Thereafter, Jerome Ogburn, President of PGAV/Community Resource Corporation, conducted a blight survey for the area from Central to Wyandotte, 15th to 17th Streets, known as the 16th and Central project area. He concluded that the 16th and Central project

area was a blighted area, and this conclusion was corroborated in general terms at hearings before the City Plan Commission and the Zoning and Planning Committee of the City Council by Whitney Kerr, a partner in Kerr-Andersen (K-A) Company, and Richard Schoegler, the Executive Director of the PIEA. At the request of the PIEA, the City passed an ordinance on August 18, 1981, declaring the 16th and Central project area to be one of the City's blighted, insanitary or undeveloped industrial areas.

"Later, at the request of the PIEA, Ogburn and his firm expanded the blight survey to include the west side of the Baltimore from 15th Street to 17th Street, so that the 1500 Baltimore property was included in the blighted area. He then found the entire area to be blighted, although no substandard buildings were found in the expansion area itself. At the request of the PIEA, the City Council, after recommendation by the City Plan Commission, passed an ordinance declaring an area that that included the west side of Baltimore from 15th Street to the south line of 16th Street, as well as the area covered by the initial ordinance, to constitute a blighted, insanitary or undeveloped industrial area.

"The PIEA then prepared a general development plan calling for solely commercial development of the area designated as blighted. The City Council approved PIEA's development plan in Ordinance No. 54369 on September 28, 1982. After advertising for redevelopment proposals, the PIEA approved a redevelopment proposal of K-A Company in December 1982.[2] This plan was neither submitted to nor approved by the City Council.

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2. Relators include a 1985 development proposal with their exhibits. The 1985 proposal differs from both the PIEA plan and

(Continued on following page)

"On November 21, 1985, the PIEA adopted a resolution authorizing the commencement of condemnation proceedings against the 1500 Baltimore property. On November 27, 1985, the PIEA filed its petition for condemnation of the area. On that same day, relators filed an action for declaratory judgment contesting the right of the PIEA to take their property. The PIEA and other named defendants moved to have the petition dismissed. The motion was first overruled but after the PIEA moved for disqualification of the overruling judge, the case was transferred to Judge Coburn. Judge Coburn, upon a motion to reconsider, dismissed the petition for declaratory judgment with prejudice and proceeded with trial of the condemnation suit.[3] Five months after the trial of the condemnation suit, in July 1986, Judge Coburn sustained the petition for condemnation and appointed the commissioners to view the property. On August 20, 1986, relators filed their petition for extraordinary relief, and a preliminary writ of prohibition was granted on August 26, 1986.

"The first issue to be determined necessarily is whether prohibition should be made available in cases such as this. Although "[t]he case law in this state concerning the use of prohibition is not totally consistent nor reconcilable," *State ex rel. Devanssay v. McGuire,*

Footnote continued—

the December 1982 redevelopment proposal. Since the record does not indicate that the 1985 proposal was ever approved by the City Council or the PIEA, it is not necessary to consider here the substantial changes in the 1985 proposal makes in the PIEA plan.

3. The dismissal of the petition for declaratory judgment was affirmed in *Tierney v. Planned Industrial Expansion Authority,* WD38208 (Mo. App. Feb. 10, 1987).

622 S.W.2d 323, 325 (Mo. App. 1981), writs of prohibition have issued in condemnation cases.

"Prohibition was used in *State ex rel. Gove v. Tate,* 442 S.W.2d 541, 542 (Mo. banc 1969), to prevent condemnation when the court found that in addition to a nonpublic purpose for the taking there was no ordinance authorizing the city to proceed with condemnation. In *State ex rel. Clothier v. Yeaman,* 465 S.W.2d 632, 634 (Mo. banc 1971), a writ of prohibition was issued when the court found it was "clearly evident" that an attempt was being made to condemn private property for a nonpublic use. Prohibition was also found to be an appropriate remedy in *State ex rel. Weatherby Advertising Co. v. Conley,* 527 S.W.2d 334, 341-342 (Mo. banc 1975), in which the respondent judge was found to lack jurisdiction to proceed with condemnation because the condemning authority had failed to comply with the statutory conditions precedent before filing its petition for condemnation. Finally, in *Devanssay,* 622 S.W.2d at 324, a preliminary writ of prohibition was issued to allow review of the landowners' allegation that the ordinance approving a Chapter 353, RSMo 1978, urban redevelopment plan and granting the redevelopment corporation the power of eminent domain was arbitrary and void because the plan did not contain the " 'detailed statement of the proposed method of financing the redevelopment' " required by the redevelopment enabling ordinance.

"*Devanssay* provides an excellent discussion of the use of prohibition in condemnation proceedings and its reasoning is dispositive here.

"As is pointed out in *Devanssay,* the court, in a condemnation proceeding, must first determine whether the

condemnation is authorized by law. *Id.* at 325. A finding that the petitioner has the right to condemn is interlocutory only and is not appealable by the landowner at that point. *Id.; State ex rel. Clothier,* 465 S.W.2d at 634. Second, the landowner's damages resulting from the taking must be established. Commissioners are appointed to assess the landowner's damages and upon payment of the commissioners' award into the court, the condemning authority acquires the property and may utilize it as prayed in the petition for condemnation. *Devanssay,* 622 S.W.2d at 325. Either party may contest the amount of the commissioners' award and request a jury trial to determine damages. *See Id.* Only after such trial has concluded is the case appealable. *Id.*

"In many instances by the time an appellate court can determine that the taking was invalid, the condemning authority will have so changed the property that redress of the landowner is impossible. The *Devanssay* court concluded that in light of the nature of condemnation proceedings, "prohibition is a proper method to prevent such alleged injustice." *Id.* at 326.

"Prohibition is the proper relief for relators to seek in this instance. If the proceedings do not comply with the statute, then the trial judge is without jurisdiction to order the condemnation to proceed. An appeal after the taking of the property and any demolition by the PIEA and the development company would be a totally futile and ineffective remedy.

"The first issue within the scope of these writ proceedings is whether the ordinance approving the plan for the development was valid. The statute predicates the acquisition of real property upon the City Council's

approval of the plan of the PIEA pursuant to § 100.400, RSMo. Under the specific direction of § 100.400.1(4):

> A plan shall be sufficiently complete to indicate its relationship to definite local objectives as to appropriate land uses, improved traffic, foster employment, public transportation, public utilities, recreational and community facilities and other public improvements and the proposed land uses and building requirements in the project area, and shall include without being limited to:
>
> (a) The boundaries of the project area, with a map showing the existing uses and condition of the real property therein;
>
> (b) A land use plan showing proposed uses of the area;
>
> (c) Information showing the standards of population densities, unemployment within area of adjacent areas, land coverage and building intensities in the area after completion of the plan;
>
> (d) A statement of the proposed changes, if any, in zoning ordinances or maps, street layouts, street levels or grades, building codes and ordinances;
>
> (e) A statement as to the kind and number of additional public facilities or utilities which will be required in the area after completion of the plan;
>
> (f) A schedule indicating the estimated length of time needed for completion of each phase of the plan.

"The plan submitted by the PIEA mentions all the matters set forth in the foregoing subsections. The ques-

tion to be determined is whether the plan's language sets forth enough factual material to permit a determination that the plan complies with the statute.

"In determining this question, the first and primary inquiry must be the intent and purpose of the legislature in drafting the statute to require that certain elements be included in the plan.

"Because the whole issue in this case turns on the question of the propriety of the condemnation action, it is appropriate to consider the grant of condemnation authority in the light of the statute. The power of the state to condemn, and particularly the delegation of that power to corporations public and private, is viewed jealously, and its exercise carefully limited. *See Maryland Plaza Redevelopment Corp. v. Greenberg,* 594 S.W.2d 284, 292 (Mo. App. 1979); *State ex rel. Terrell v. Nicholls,* 719 S.W.2d 862, 866 (Mo. App. 1986). In determining whether or not the power of condemnation exists under a given statute delegating the same to a public or private entity, the courts will examine the requirements of the statute with some care to determine that the condemnation power is appropriately delegated and exercised. *See Maryland Plaza Redevelopment Corp.,* 594 S.W.2d at 292; *State ex rel. Terrell,* 719 S.W.2d at 866. It is in the light of that overriding principle in eminent domain law that the particular statutory sections must be considered.

"The passage of an ordinance by the City Council is a legislative act. *Annbar Associates v. West Side Redevelopment Corp.,* 397 S.W.2d 635, 655 (Mo. banc 1965), *appeal dismissed,* 385 U.S. 5 (1966); *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.,* 518 S.W.2d 11, 15, 19 (Mo. 1974). Such an act will ordinarily

be deferred to by the courts but when the City Council has acted arbitrarily or as a result of fraud, collusion or bad faith, the City Council's decision need not be accepted by the court. *State on Inf. of Dalton v. Land Clearance for Redevelopment Authority,* 364 Mo. 974, 989, 270 S.W.2d 44, 52 (banc 1954); *Annbar Associates,* 397 S.W.2d at 655; *State ex rel. Atkinson v. Planned Industrial Expansion Authority,* 517 S.W.2d 36, 45 (Mo. banc 1975).

"No allegations of fraud or bad faith have been set forth here. The validity of the city ordinance in question turns on whether or not the ordinance was arbitrarily passed. If the City Council passed the ordinance approving the PIEA's redevelopment plan without any factual material in the plan or evidence before the Council to support a legislative determination of compliance with § 100.400, RSMo, then the ordinance is indeed arbitrary and void.

"Turning now to the question of the ordinance and plan in the instant case, it should be noted that the ordinance itself does not contain any specific findings with respect to the matters contained in § 100.400.1(4), (a) through (f), set forth above. All of the verbiage concerning these matters is contained in the plan itself and the ordinance simply adopts the plan. It is apparent from the statute that its general purpose and intent is to require a legislative oversight of the plan developed by the agency. The plan must be approved by the City Council and every substantial change must likewise receive approval. The statute clearly requires the legislative body to find that the plan complies with the statute before the legislative body may approve the plan. The

whole purpose of the statute would be thwarted if there was not a legislative determination of the validity and sufficiency of the plan prior to the development of the project. The legislature has seen fit to require legislative approval prior to acquisition of land or any other such implementation of a redevelopment plan.

"Looking at the subsections of § 100.400.1(4), (c) through (e), subsection (c) requires:

> Information showing the standards of population densities, unemployment within an area and adjacent areas, land coverage and building intensities in the area after completion of the plan[.]

The plan "anticipates" that approximately 500,000 square feet of office space will be built in the project area. The only other language even remotely suggestive of the "information" required by subsection (c) is the following.

> Any specific development proposal approved . . . will contain among other things adequate provision for traffic, vehicular parking, safety from fire, adequate provision for light and air, sound desire and arrangement and improved employment opportunities. The plan is not expected to have any significant negative impact on adjacent traffic patterns or public transportation.

There is simply no factual material of any sort concerning standards of population densities, unemployment within the area and adjacent areas or land coverage after completion of the plan. The only exhibit that purports to demonstrate the area after the implementation of the plan, which was an attachment to the plan itself, is a

sketch of the area showing the ground elevations and two proposed streets. There is not a shred of factual material nor evidence before the Council concerning the specific factual matters required by subsection (c).

"Subsection (d) reads as follows:

> A statement of the proposed changes, if any, in zoning ordinances or maps, street layouts, street levels or grades, building codes and ordinances[.]

Again the plan itself contains absolutely no factual material concerning any proposed changes in zoning ordinances or maps, street layouts, street levels or grades, building codes or ordinances. Regarding streets and zoning, the following language is all that appears:

> It is contemplated that major portions of Central and Wyandotte Streets and associated alleys will be vacated. Proposed new traffic corridors are shown on attached Exhibit 4 [proposed land use map]. Depending upon the nature of future development, it may be necessary to construct other streets or alter the location of the proposed traffic corridors.
>
> . . . .
>
> Given the proposed land uses of this plan, it is anticipated that the area will be rezoned to an appropriate planned commercial business district. Since it is not possible to anticipate the full extent of future development plans at this time, additional zoning changes may be necessary.

Again, this generalized language fails to provide any factual basis for a legislative determination.

"Under subsection (e), the statute requires:

> A statement as to the kind and number of additional public facilities or utilities which will be required in the area after completion of the plan[.]

The plan recognizes that there may be relocation or abandonment of existing water lines as well as construction of new utilities. With respect to these matters, the plan specifically recites as follows: "The type and location of abandonment and/or relocation and/or construction of [water and sewer] lines, at this time, is impossible to determine." Thus, the plan itself simply denies that a statement as to the kind and number of additional public facilities or utilities which will be required can be made. Obviously a part of the legislative determination made when such a plan is approved is a determination of the consequence of such approval on the overall utility system and scheme of the city and, in particularly on the area in question. The only purpose for the statute to require such factual matters in the plan is to permit the members of the legislative body to make an intelligent, informed and appropriate legislative decision with respect to approval of the plan. Absent such a factual basis, the legislative determination can only be arbitrary and capricious and without any factual foundation. The plan simply does not provide any factual basis for a determination by the City Council of the validity of the plan.

"The second issue, the question of modification of the plan without Council approval, is likewise based upon the failure of the plan as presented by the PIEA to provide any specific frame of reference from which to measure any change in the plan from that proposed and approved by the City Council. Section 100.400.1(10) pro-

vides, "[w]here the proposed modification will substantially change the plan as previously approved by the governing body." That language is likewise recited in the ordinance itself. Both the approved plan and the redevelopment proposal of the K-A company are in evidence in this case. The K-A development proposal was approved by the PIEA on December 8, 1982, but has been neither presented to nor approved by the City Council. Comparison of the salient features of the K-A development proposal and the PIEA plan approved by the September 28, 1982, ordinance reveals that the development proposal differs markedly from the PIEA plan. The PIEA plan only makes sketchy provision for access by new streets; the K-A plan substantially modifies existing streets and utilities and the proposals are quite different from those shown in the PIEA plan. The K-A proposal requires the development of a detailed utilities plan for new and upgraded utilities. There are detailed plans for structures for offices, retail shops, a hotel, and a major office building. None of this information is contained in the PIEA plan.

"The foregoing is not intended as a criticism of the plan submitted by the K-A Development Company. It is submitted simply to show that the K-A development proposal makes very substantial changes from the general and nonspecific language of the PIEA plan which factually would provide an entirely different basis for a legislative determination. The exhibits attached to the K-A plan show very substantial departures from the existing situation as well as from the PIEA plan. Very substantial variations in the streets, sewers, and utilities are shown by the K-A plan. This is demonstrated by reason of the site plans and building location plans at-

tached to the K-A plan which when compared with the original PIEA plan show that sewers and utilities would either be partially located under multi-story buildings or would require very substantial rerouting. There is simply no factual information as to the impact of these and other significant changes in the plan upon either the area itself, the City, or the adjacent areas. All of the foregoing leads inevitably to the conclusion that the K-A plan constitutes a substantial modification and departure from the PIEA plan. As such, it has not received the approval of the governing body, the City Council of Kansas City, Missouri, and the use of condemnation to implement the K-A plan will simply violate openly the requirement of the statute and the ordinance that such modifications in the plan receive legislative approval by the City Council of Kansas City, Missouri. For the foregoing reasons, the preliminary writ issued in this cause should be made absolute.

So ordered."

Cause No. 69528 should be retransferred to the Court of Appeals, Western District as improvidently transferred for entry of and publication of the Court of Appeals opinion or this Court should make the preliminary writ in prohibition absolute thus making Cause No. 69317 for declaratory judgment and damages for tortious interference with property moot.

Warren D. Welliver,
Judge

CLERK OF THE SUPREME COURT
State of Misscuri
Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

January 20, 1988

Mr. James P. Tierney
Mr. Terry J. Satterlee
2600 Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108

Re: James P. Tierney, et al. vs. The Planned Industrial Expansion Authority of Kansas City, Mo., et al., No. 69317

(CONSOLIDATED WITH)

State ex rel. James P. Tierney, et al. vs. The Honorable H. Michael Coburn, Circuit Judge, et al., No. 69528

Gentlemen:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellants-Relators' motion for rehearing overruled."

Very truly yours,

/s/ Thomas F. Simon
Clerk

cc: Mr. David Richard Bohm
Mr. James C. Bowers, Jr.
and
Ms. Donna L. Stanford
Ms. Sarah Siegel
and
Ms. Jeanne Vatterott
Mr. Lowell L. Smithson
Mr. Irvin Dagen
and
Mr. Gregory R. Smith
Mr. John F. Ingraham
Mr. Howard C. Wright, Jr.
Mr. Robert J. Campbell
Mr. Max Foust and
Mr. Steven D. Steinhilber

(Filed March 21, 1988)

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

No. 69317

JAMES P. TIERNEY, et al.,
Appellants,

vs.

THE PLANNED INDUSTRIAL EXPANSION AUTHORITY OF KANSAS CITY, MISSOURI, et al.,
Respondents.

(Consolidated with)

No. 69528

STATE ex rel. JAMES P. TIERNEY, et al.,
Relators,

vs.

THE HONORABLE H. MICHAEL COBURN,
Circuit Judge, et al.,
Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that appellants/relators above-named hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Missouri, affirming the judgment in Case

No. 69317 and quashing the preliminary rule in Case No. 69528, entered in this action on December 15, 1987, in which an Order overruling Appellants'/Relators' Motion for Rehearing was entered January 20, 1988.

Lathrop Koontz & Norquist
/s/ James P. Tierney
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Attorneys for Appellants/Relators

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed, postage prepaid, this 18th day of March, 1988, to:

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All parties required to be served have been served.

/s/ C. W. Scherb
Attorney for Appellants/Relators

(2)

Supreme Court, U.S.
FILED
MAY 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1708

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES P. TIERNEY, et al.,
Appellants,

vs.

THE PLANNED INDUSTRIAL EXPANSION AUTHORITY OF KANSAS CITY, MISSOURI, et al.,
Appellees.

JAMES P. TIERNEY, et al.,
Appellants,

vs.

THE HONORABLE H. MICHAEL COBURN,
Circuit Judge, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

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May 17, 1988

QUESTIONS PRESENTED

1. Whether appellants' appeal was taken in conformity with the Rules of this Court.

2. Whether the issue presented on appeal was timely or properly raised by appellants or expressly passed on in the Missouri state courts.

3. Whether the Missouri Supreme Court decision below rests on adequate and independent state grounds.

4. Whether the issue presented on appeal presents a substantial federal question.

TABLE OF CONTENTS

Questions Presented 1
State Statute Involved 2
Argument 4
Conclusion 15
Supplementary Appendix A69

TABLE OF AUTHORITIES

Cases:

Beck v. Washington, 369 U.S. 541 (1962) 7
Berman v. Parker, 348 U.S. 26 (1954) 11, 13
City of St. Louis v. Butler Co., 358 Mo. 1221, 219 S.W. 2d 372 (1949) (en banc) 5, 6
Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) .. 13
Hill v. California, 401 U.S. 797 (1971) 5
Michel v. Louisiana, 350 U.S. 91 (1955) 5
New Orleans Pub. Serv., Inc. v. City of New Orleans, 281 U.S. 682 (1930) 12
Parking Sys., Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11 (Mo. 1974) 11
Radio Station WOW v. Johnson, 326 U.S. 120 (1945) .. 9
St. Louis Housing Auth. v. Barnes, 375 S.W.2d 144 (Mo. 1964) 6
United States v. Mazurie, 419 U.S. 544 (1975) 12
United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963) 12

Statutes and Rules:

28 U.S.C. § 2403(b) 4
Mo. Rev. Stat. §§ 100.300-.620 (1986) 2
Mo. Rev. Stat. § 100.310 (1986) 2, 10, 11
Mo. Rev. Stat. § 100.320 (1986) 2
Mo. Rev. Stat. § 100.390 (1986) 2
Mo. Rev. Stat. § 100.400 (1986) 3
Supreme Court Rule 10.2 4
Supreme Court Rule 28 4
Supreme Court Rule 28.1 1
Supreme Court Rule 28.4(c) 4

No. 87-1708

In the Supreme Court of the United States

OCTOBER TERM, 1987

JAMES P. TIERNEY, et al.,
Appellants,

vs.

THE PLANNED INDUSTRIAL EXPANSION AUTHORITY OF KANSAS CITY, MISSOURI, et al.,
Appellees.

JAMES P. TIERNEY, et al.,
Appellants,

vs.

THE HONORABLE H. MICHAEL COBURN,
Circuit Judge, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

The undersigned appellees[1] in the above-entitled cases move to dismiss on the grounds that the appeal has not

1. Pursuant to Rule 28.1, appellee Economic Development Corporation of Kansas City, Missouri (formerly Kansas City Corporation for Industrial Development), a Missouri nonprofit corporation, states that it has no parent or subsidiary corporations, but that it is affiliated with the following entities: (1) KCCID-Charitable Fund; (2) EDC Loan Corporation; (3) Planned Industrial Expansion Authority of Kansas City, Missouri; (4) Land Clearance for Redevelopment Authority of Kansas City, Missouri; (5) Port Authority of Kansas City, Missouri; (6) Tax Increment Financing Commission; and (7) City of Kansas City, Missouri.

been taken in conformity with the Rules of this Court, that the federal question sought to be reviewed was not timely or properly raised or passed upon, and that the decision below rests on adequate and independent state grounds. Said appellees further move to dismiss or affirm on the ground that the question presented is so unsubstantial as not to need further argument.

STATE STATUTE INVOLVED

This appeal questions the validity of the application of one of Missouri's urban renewal laws, The Planned Industrial Expansion Law, 1967 Mo. Laws 172 (current version at Mo. Rev. Stat. §§ 100.300-.620 (1986)). This statutory system (the "PIEA Act") authorized the City of Kansas City, Missouri to create The Planned Industrial Expansion Authority of Kansas City, Missouri ("PIEA"), itself "a public body corporate and politic, exercising public and essential governmental functions," *id.* § 100.390, for clearance or redevelopment of "blighted, insanitary or undeveloped industrial areas" in the city. *Id.* § 100.320. The PIEA Act defines "blighted," "insanitary," "undeveloped industrial areas" with a long list of factors or criteria including, among others, "inadequate street layout," "obsolete platting," "vacant parcels of land not used economically," and "intermittent commercial and industrial structures in a primarily industrial or commercial area." *Id.* § 100.310(2), (11), (18). PIEA's clearance may be for or its redevelopment may consist of commercial or industrial uses. *Id.* § 100.310(9). Condemnation by PIEA is authorized upon completion of certain legislative actions, including the declaration by the governing body of the city that the subject area is a blighted,

insanitary, or undeveloped industrial area in need of development, *id.* § 100.400.1(2) (the "blight ordinance" step), and the approval by the governing body of the city of a general plan submitted by PIEA for redevelopment of the area, *id.* § 100.400.1(4) (the "plan ordinance" step).

The above cited sections of the PIEA Act are set forth in the accompanying appendix. (App. A72-A85).

ARGUMENT

This Appeal Was Not Taken In Conformity With The Rules Of This Court

Appellants have in several respects violated the Rules of this Court for the taking of an appeal.

First, appellants' Notice of Appeal (App. A65-A68) fails to specify the statute or statutes under which the appeal is taken, as required by Rule 10.2 of this Court.

Second, the notice does not identify the parties taking the appeal, in further violation of Rule 10.2.

Third, appellants failed to comply with the additional requirement of Rule 10.2 that proof of service in the manner prescribed by Rule 28 shall be filed with the Notice of Appeal. The Notice of Appeal was accompanied by neither a written acknowledgment of service, nor by a certificate of service signed by a member of the Bar of this Court,[2] nor by an affidavit of service in which the facts and circumstances of service are recited. Proof of service sufficient to satisfy Rule 28 thus was not provided.

Finally, even though appellants seek to challenge the constitutionality (as applied to appellants) of a statute of the State of Missouri, their Jurisdictional Statement fails to state that 28 U.S.C. § 2403(b) may be applicable, as required under Rule 28.4(c).

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2. The Court is respectfully requested to take judicial notice that the person signing appellants' incomplete certificate of service, Ms. Cynthia Weber Scherb, is not a member of the Bar of this Court.

Because it was not taken in conformity with the Rules of this Court, appellees respectfully submit that this appeal should be dismissed.

The Federal Question Sought To Be Reviewed Was Not Timely Or Properly Raised And Was Not Expressly Passed On

A Federal Constitutional claim cannot be considered by this Court unless it has been either timely and properly preserved in the state court or resolved by the state court. *Hill v. California*, 401 U.S. 797, 805 (1971). The issue presented by appellants was neither timely and properly raised by them below, nor ever passed on by the state courts.

At none of the earlier stages of these cases have appellants advanced the Federal Constitutional issue that they now seek to raise. In Missouri, constitutional issues must be raised at the earliest possible moment. *City of St. Louis v. Butler Co.*, 358 Mo. 1221, 1227, 219 S.W.2d 372, 376 (1949) (en banc). A state's limitations on raising Federal Constitutional rights must be respected. *Michel v. Louisiana*, 350 U.S. 91, 97 (1955). In their petition seeking a declaratory judgment, while alleging that the City Council determination of blight was arbitrary and capricious, appellants claimed only that the legislative action violated appellants' rights under the Missouri Constitution; nowhere do appellants present any claim arising under the Constitution of the United States. Petition for Declaratory Judgment, for Permanent Injunction, and for Damages for Tortious Conduct (filed Nov. 27, 1985).[3]

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3. Copies of appellants' pleadings and briefs filed below have been lodged with the Clerk of this Court.

Appellants likewise advanced no such argument in their written suggestions presented to the Trial Court with the declaratory judgment case. Suggestions in Opposition to Defendants' Motion to Dismiss Counts I, II and III (filed Jan. 21, 1986). Further, though permitted to do so in Missouri condemnation proceedings, appellants filed no answer raising constitutional issues in the parallel condemnation action. Moreover, no Federal Constitutional issue was raised during the lengthy four-day evidentiary trial held in the condemnation case on power to condemn issues, or in appellants' post-trial brief. Defendants' Trial Brief on the Issues Whether the City Council Acted Arbitrarily and Exceeded Its Power in Finding That the P.I.E. Plan is in Conformance with the General Plan for the Development of the City as a Whole (filed Mar. 4, 1986). Under the circumstances, it comes as no surprise that the Trial Court did not pass on, as appellants did not give the Trial Court the opportunity to pass on, the Federal Constitutional issue that appellants now seek to raise. (App. A7).

In short, the Federal Constitutional issue should not be considered as it was not raised at the first opportunity in either of the two Trial Court proceedings.

Even at the appellate stages of this litigation, appellants never timely and properly raised this Federal Constitutional issue. Missouri requires constitutional issues on appeal to be stated with specificity, including the constitutional provision by article and section number, in the briefing points and otherwise. *St. Louis Housing Auth. v. Barnes*, 375 S.W.2d 144, 147 (Mo. 1964); *Butler Co., supra.* Such rules are recognized by this Court, and appeals to this Court are dismissed if a Federal

Constitutional issue was not raised in the points below. *See Beck v. Washington,* 369 U.S. 541, 553 (1962). In their briefing on the writ in the Court of Appeals, appellants' sole reference to the United States Constitution related to an issue—the right to appellate review—that is wholly different from the question now being raised. Relators' Brief (filed Sept. 17, 1986) at 9-10. The Federal Constitutional issue now being advanced was never submitted to the Missouri Court of Appeals.

When the Court of Appeals issued a preliminary and permanent writ of prohibition, it did so on the ground only that the plan ordinance passed by the City Council did not meet the statutory requirements of the PIEA Act. (App. A69-A70). The subsequent decision of the Court of Appeals did not constitutionally invalidate the blight ordinance, nor did it discuss the validity, either constitutional or statutory, of a city council's considering expert evidence of economic underutilization, both of which appellants seek to place at issue here. (App. A8-A21).

After transfer to the Supreme Court of Missouri, in their briefing before the Supreme Court, appellants claimed that the PIEA Act as applied "violate[s] the Missouri Constitution." Relators' Brief on Transfer (filed Aug. 3, 1987) at 9. Again, no reference was made to the Federal Constitution, to any Federal Constitutional cases, or to due process.

The Missouri Supreme Court reversed the Court of Appeals and reinstated the Trial Court's order to condemn, finding that the plan ordinance sufficiently complied with the PIEA Act. (App. A28-A47). The Court ruled that evidence relating to economic underutilization may be a proper basis for condemnation under the PIEA

Act,[4] *id.* at A35-A36, stating that "the concept of urban redevelopment has gone far beyond 'slum clearance' and the concept of economic underutilization is a valid one." *Id.* at A36. The Court further stated:

> We need not repeat all of the evidence which was before the City Council tending to show that redevelopment of this area could promote a higher level of economic activity, increased employment, and greater services to the public. Industrial development is a proper public purpose. We do not sit as a court of appeal over the decisions of the Council. The burden is on the owners to show that the finding of blight constitutes an arbitrary or unreasonable abuse of a legislative authority. They have not made this showing.

Id. The state Supreme Court did not pass on any Federal Constitutional issue, nor, for that matter, did the dissent.

Appellants subsequently moved for rehearing before the state Supreme Court. In this motion for rehearing, appellants, belatedly, made a one-sentence, general reference to the United States Constitution:

> The holding of the Court, as applied to movants herein violates their rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

Motion for Rehearing (filed Dec. 29, 1987) at 6. Appellants did not explain how the holding violated the Fed-

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4. Contrary to appellants' gross misstatement in their Jurisdictional Statement that the state Supreme Court expressly held the evidence did not violate due process, Jurisdictional Statement at 1, 9, the state Supreme Court did not even mention due process.

eral Constitution, nor did they even make reference to any specific Federal Constitutional right. *Id.* at 1-6. Due process is still not mentioned, much less any claim of a constitutionally invalid application of any blight statute. The Missouri Supreme Court denied appellants' motion for rehearing, declining to pass on the scattergun Federal Constitutional claim that appellants had tardily advanced. (App. A63). Raising a Federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient, particularly when the state court, as here, has not passed on the issue. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945). The appeal should be dismissed.

The Decision Below Rests On Adequate And Independent State Grounds

Appellants erroneously state that the economic underutilization evidence was "the standard" which was in fact applied by the City Council in determining blight. In fact, as stated by the Missouri Supreme Court, the economic underutilization evidence was only part of a large amount of blight evidence presented to the City Council. (App. A35-A36). The term "economic underutilization" was actually a term of art used by an urban renewal expert (Mr. Ogburn) to summarize the bleak economic situation in the subject area. His summary term was based on his written factual findings relating to obsolete platting, an archaic street and alley pattern, a substantial amount of vacant land, decaying and dilapidated buildings, and other evidence. Moreover, in addition to the written findings in his study, the City Council heard the testimony of three urban renewal experts that the area was predominantly blighted, reviewed an earlier blight study

concerning the same area, and viewed color slides depicting the area.[5]

The standards applied by the City Council were those found in the PIEA Act itself, which provides that factors such as obsolete platting, dilapidated property, and outmoded street patterns may be considered by the City's governing body.[6] The validity of such factors as grounds

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5. Further, the City Council considered a 1978 blight study developed for yet another public authority finding the same area predominantly blighted using federal blight standards developed by the Department of Housing and Urban Development. Moreover, the expert head of the City Development Department testified at the legislative hearing that the City Development Department's own independent investigation and study of the subject area showed it was predominantly blighted. The City Council in adopting the blight ordinance considered all of the documents and studies in the file of the City Development Department. The Supreme Court accurately noted what the City Council was shown—that the subject area was in the oldest part of the city adjoining the downtown business district (App. A37) and that centrally located urban land is scarce. *Id.* at A36. Appellants presented no evidence whatever to the City Council.

6. Copies of the three sections of the PIEA Act defining blight were actually given to the City Council at the hearing and the City Council in the subject blight ordinance expressly referred to these three sections. The blight ordinance does not mention economic underutilization. Further, the study of Mr. Ogburn also contained written factual findings that parallel specific statutory blight factors found in the PIEA Act itself and that supported the conclusion of blight independent of any concern with economic underutilization. For example, the Ogburn study concluded that the following factors relevant to a blight determination under the PIEA Act were present:

> 1. A predominance of inadequate street patterns in the area, which required that 27 percent of total land area be used for right of way rather than productive, tax generating property. The PIEA standards include an "inadequate street layout," Mo. Rev. Stat. § 100.310(2), (18) (1986), and conditions representing "an inability to pay reasonable taxes," *id.* § 100.310(18).
>
> 2. A predominance of obsolete platting. The entire area was so platted. The PIEA Act standards include obsolete and inadequate platting. *Id.* § 100.310(2), (18).

(Continued on following page)

for condemning property have already been passed upon by this Court and approved.[7] *Berman v. Parker*, 348 U.S. 26, 30 (1954). Moreover, the validity of such factors have been passed upon and approved by the Missouri Supreme Court, and such precedent has not been challenged by appellants here. *Parking Sys., Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11 (Mo. 1974). Even without the analysis of economic underutilization, sufficient evidence remains to support the legislative finding of blight.[8] The Missouri Supreme

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Footnote continued—

3. That 32.4 percent of total land area was used for surface parking, much of it unpaved and containing weeds and accumulated trash. The PIEA standards include "vacant parcels of land not used economically," and it may also be considered that such extensive parking contributes to "intermittent commercial and industrial structures in a primarily industrial or commercial area," or a commercial use which retards economic growth. *Id.* § 100.310(18).

4. That 14.5 percent of total land area was currently vacant or used for outside storage. The PIEA Act standards include "vacant parcels of land." *Id.*

5. That 8.4 percent of property in the area included deteriorated buildings containing, for example, broken retaining walls, boarded windows, and crumbling foundations. The PIEA Act standards include "old, decaying, obsolete buildings," *id.*, buildings suffering from "dilapidation, deterioration, age or obsolesence," *id.* § 100.310(11), and "deterioration of site improvements," *id.* § 100.310(2).

6. That 5.3 percent of the property in the area was used for underproductive economic purposes, including dilapidated residential areas and a massage parlor. The PIEA standards include "commercial uses amounting to conditions which retard economic . . . growth." *Id.* § 100.310(18).

7. Appellants do not here challenge the constitutional validity of the statutes themselves.

8. See notes 5 and 6, *supra*. Thus, independent sources of substantial evidence were present from which a reasonable legislator could find the subject area was predominantly blighted. The Missouri Supreme Court even noted that more than half of the subject land area was consumed with streets, alleys, and parking lots that the legislative authority might properly find to contribute to a condition of blight. (App. A35).

Court decision rests on adequate independent state grounds, and this appeal should be dismissed for that reason.

The Case Presents No Substantial Question Not Previously Decided By This Court

Even if the only evidence presented before the City Council had been the expert Mr. Ogburn's judgment of economic underutilization, appellants still would not have presented a substantial issue here on appeal. Legislative findings enjoy a strong presumption of constitutional validity. *New Orleans Pub. Serv., Inc. v. City of New Orleans,* 281 U.S. 682, 686 (1930). Standards applied by legislative bodies are not unconstitutionally vague simply because they might be applied arbitrarily. In assessing a claim of vagueness, standards are not applied in a vacuum, but rather applied to the case at hand. *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 33 (1963). Appellants submit unrealistic hypotheticals suggesting that any property might arguably be put to a higher and better economic use, but the blighted area actually at issue here did not present any such speculative situation. The expert study by Mr. Ogburn found that the subject area was realizing only 25 percent of its full economic potential. In other words, the area was 75 percent economically underutilized. As stated by the Missouri Supreme Court, appellants must show that the legislative finding of blight was arbitrary (*i.e.*, that no reasonable legislator could have found the subject area was blighted) and appellants have not carried this heavy legal burden. (App. A36).

None of the cases presented by appellants in their Jurisdictional Statement are on point, further showing the lack of any substantial question. In fact, appellants

do not cite a single case striking down any statute, or any application of any statute, on grounds of vagueness. The case of *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), confirms the state's broad eminent domain powers by declaring that the transfer of private property from a group of private landowners to another group of private landowners may be a sufficient constitutional public use. *Id.* at 244. Nothing in the case deals with the quite different constitutional vagueness issue. Moreover, *Berman v. Parker*, 348 U.S. 26 (1954), cited by appellants in their Jurisdictional Statement, actually supports a concept of economic underutilization as being an appropriate standard to apply in an urban renewal situation. As stated in *Berman*:

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide the nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Id. at 33.

Urban renewal has long been accepted as a proper public use for the eminent domain power. Objecting

landowners must establish that the legislative findings supporting the need for urban renewal were arbitrary and capricious. The issue here is not a constitutional one, but an evidentiary one. There is no need for the United States Supreme Court to reexamine the evidentiary issue presented by appellants, which has already been reviewed three times in the Missouri state courts.

CONCLUSION

The undersigned appellees submit that the Court should dismiss this appeal, or, in the alternative, should affirm the Missouri Supreme Court decision below, for the reasons above stated.

Respectfully submitted,

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May 17, 1988

SUPPLEMENTARY APPENDIX

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, ex rel. JAMES P. TIERNEY, GEORGE E. TIERNEY, WILLIAM J. TIERNEY, and THOMAS F. TIERNEY, Relators,	)	
vs.	)	No. WD38633
THE HONORABLE H. MICHAEL COBURN, Circuit Judge, and CARL E. BOLTE, JR., ROBERT THANE JOHNSON, and KEITH P. BONDURANT, Commissioners, Respondents.	)	

PRELIMINARY RULE IN PROHIBITION

The State of Missouri to The Honorable H. Michael Coburn, Judge of the Circuit Court of Jackson County, Missouri:

WHEREAS, relators, James P. Tierney, George E. Tierney, William J. Tierney, and Thomas F. Tierney, have filed their Petition for Writ of Prohibition from which it appears that you are or may be exceeding your jurisdiction in ordering condemnation of relators' property and appointing commissioners to value the property in a certain cause now pending in the Circuit Court of Jackson County, Missouri, being Case No. CV-85-26543, in which relators are defendants and PIEA is plaintiff, it being alleged that the PIEA development plan did not include the elements required by §§ 100.400-1(4), 100.400-1(7), 100.400-1(9),

100.310(9), 100.310(14), and 100.310(15) (amended L. 1980 and L. 1982 RSMo.), and it being further alleged that the K-A Company's redevelopment plan or plans adopted by PIEA on December 8, 1982, substantially modified the PIEA's development plan approved by the City Council on September 28, 1982, and it being further alleged that this modification or modifications were not approved by the City Council as required by § 100.400-1(10) of the statute, and it being further alleged that because of said lack of statutory compliance, PIEA is without authority to condemn relators' property and that the circuit court is likewise without jurisdiction to do so in the cause asserted, it is therefore

ORDERED that this preliminary rule in prohibition be and the same is hereby issued out of and under the seal of this court directed to you, The Honorable H. Michael Coburn, Carl E. Bolte, Jr., The Honorable Keith P. Bondurant, and Robert Thane Johnson, to refrain from proceeding further in Case No. CV-85-26543 and that you give no further effect to the order of condemnation entered, nor act to file a report of commissioners nor take any other action to effectuate the provisions of the order of condemnation until further order of this court and that you show cause to this court on or before September 10, 1986, why this Preliminary Rule should not be made absolute and a final judgment in prohibition entered in this proceeding. The relators are allowed to make reply, or other pleading, to the respondent's return by September 17, 1986.

Dated this 26th day of August, 1986.

/s/ Jack P. Pritchard
Jack P. Pritchard, Acting
Presiding Judge Writ
Division

Shangler and Dixon, JJ. Concur.

CC: The Honorable H. Michael Coburn
Judge of the Circuit Court of Jackson County
415 East 12th
Kansas City, MO 64106

Mr. Carl E. Bolte, Jr., Commissioner
800 Greenway Terrace
Kansas City, MO 64113

The Honorable Keith P. Bondurant, Commissioner
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MISSOURI REVISED STATUTES (1986)

100.310. Definitions.—As used in this law, the following words and terms mean:

(1) **"Authority"**, a public body corporate and politic created by or pursuant to sections of this law or any other public body exercising the powers, rights and duties of such an authority;

(2) **"Blighted area"**, an area which, by reason of the predominance of defective or inadequate street layout, insanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals or welfare in its present condition and use;

(3) **"Bond"**, any bonds, including refunding bonds, notes, interim certificates, debentures or other obligations issued by an authority pursuant to this law;

(4) **"City"**, all cities of this state now having or which hereafter have four hundred thousand inhabitants or more according to the last decennial census of the United States or any city that has adopted a home rule charter pursuant to section 19 of article VI of the Missouri Constitution;

(5) **"Clerk"**, the official custodian of records of the city;

(6) **"Federal government"**, the United States of America or any agency or instrumentality corporate or otherwise of the United States of America;

(7) **"Governing body"**, the city council, common council, board of aldermen or other legislative body charged with governing the municipality;

(8) **"Industrial developer"**, any person, partnership or public or private corporation or agency which enters or proposes to enter into an industrial development contract;

(9) **"Industrial development"**, the acquisition, clearance, grading, improving, preparing of land for industrial and commercial development and use and the construction, reconstruction, purchase, repair of industrial and commercial improvements, buildings, plants, additions, stores, shops, shopping centers, office buildings, hotels and motels and parking garages, multi-family housing facilities, warehouses, distribution centers, machines, fixtures, structures and other facilities relating to industrial and commercial use in blighted, insanitary or undeveloped industrial areas; and the existing merchants, residents, and present businesses shall have the first option to redevelop the area under this act*;

(10) **"Industrial development contract"**, a contract entered into between an authority and an industrial developer for the industrial development of an area in conformity with a plan;

(11) **"Insanitary area"**, an area in which there is a predominance of buildings and improvements which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation or open spaces, high density of population and

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*Words "this act" appear in original rolls. Intent probably was to refer to entire "Planned Industrial Expansion Law", §§ 100.300 to 100.620.

overcrowding of buildings, overcrowding of land, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime or constitutes an economic or social liability and is detrimental to the public health, safety, morals or welfare;

(12) **"Obligee"**, any bondholders, agents or trustees for any bondholders, lessor demising to the authority property used in connection with industrial clearance project, or any assignee or assignees of the lessor's interest or any part thereof, and the federal government when it is a party to any contract with the authority;

(13) **"Person"**, any individual, firm, partnership, corporation, company, association, joint stock association, or body politic; and shall include any trustee, receiver, assignee or other similar representative thereof;

(14) **"Plan"**, a plan as it exists from time to time for the orderly carrying on of a project of industrial development;

(15) **"Project"**, any work or understaking:

(a) To acquire blighted, insanitary and undeveloped industrial areas or portions thereof including lands, structures or improvements the acquisition of which is necessary or incidental to the proper industrial development of the blighted, insanitary and undeveloped industrial areas or to prevent the spread or recurrence of conditions of blight, insanitary or undevelopment;

(b) To clear any such areas by demolition or removal of existing buildings, structures, streets, utilities or other improvements thereon and to install, construct

or reconstruct streets, utilities and site improvements essential to the preparation of sites for uses in accordance with a plan;

(c) To construct, reconstruct, remodel, repair, improve, install improvements, buildings, plants, additions, stores, shops, shopping centers, office buildings, hotels and motels and parking garages, multi-family housing facilities, warehouses, distribution centers, machines, fixtures, structures and other facilities related to industrial and commercial uses;

(d) To sell, lease or otherwise make available land in such areas for industrial and commercial or related use or to retain such land for public use, in accordance with a plan;

(16) **"Public body"**, the state or any municipality, county, township, board, commission, authority, district or any other subdivision of the state;

(17) **"Real property"**, all lands, including improvements and fixtures thereon, and property of any nature appurtenant thereto, or used in connection therewith, and every estate, interest and right, legal or equitable, therein, including terms for years and liens by way of judgment, mortgage or otherwise and the indebtedness secured by such liens;

(18) **"Undeveloped industrial area"**, any area which, by reason of defective and inadequate street layout or location of physical improvements, obsolescence and inadequate subdivision and platting contains vacant parcels of land not used economically; contains old, decaying, obsolete buildings, plants, stores, shops, shopping centers, office buildings, hotels and motels and parking garages, warehouses, distribution centers, structures; contains

buildings, plants, stores, shops, shopping centers, office buildings, hotels and motels and parking garages, multi-family housing facilities, warehouses, distribution centers and structures whose operation is not economically feasible; contains intermittent commercial and industrial structures in a primarily industrial or commercial area; or contains insufficient space for the expansion and efficient use of land for industrial plants and commercial uses amounting to conditions which retard economic or social growth, are economic waste and social liabilities and represent an inability to pay reasonable taxes to the detriment and injury of the public health, safety, morals and welfare.

100.320. Planned industrial expansion authority created, powers exercised, when.—There is hereby created in each city, as herein defined, a public body corporate and politic to be known as "The Planned Industrial Expansion Authority" of the city; provided, however:

(1) That such authority shall not transact any business or exercise its powers hereunder until and unless the governing body shall approve, by resolution or ordinance, the exercising in such city of the powers, functions and duties of an authority under this law;

(2) That the governing body of a city shall not adopt a resolution or ordinance pursuant to subdivision (1) above unless it finds:

(a) That one or more blighted, insanitary or undeveloped industrial areas exist in such community; and

(b) That the development of such area or areas is necessary in the interest of the public health, safety, morals or welfare of the residents of such city.

. . . .

100.390. Authority to be a body corporate and politic, powers and duties of authority.—An authority shall constitute a public body corporate and politic, exercising public and essential governmental functions and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this law, including the following powers in addition to others granted:

(1) To sue and to be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority; and to make and from time to time amend and repeal bylaws, rules and regulations, not inconsistent with this law, to carry out the provisions of this law;

(2) To prepare or cause to be prepared plans for industrial development plans and to undertake and carry out industrial clearance projects for industrial development;

(3) To arrange or contract for the furnishing or repair, by any person or agency, public or private, of services, privileges, works, streets, roads, public utilities or other facilities for or in connection with a clearance project; and notwithstanding anything to the contrary contained in this law or any other provision of law, to agree to any conditions that it may deem reasonable and appropriate attached to federal financial assistance and imposed pursuant to federal law relating to the determination of prevailing salaries or wages or compliance with labor standards, in the undertaking or carrying out of a clearance project, and to include in any contract let in connection with such a project provisions to fulfill

such of the conditions as it may deem reasonable and appropriate;

(4) Within its area of operation, to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, eminent domain or otherwise, any real or personal property or any interest therein, including fee simple absolute title, together with any improvements thereon, necessary or incidental to a project; to construct, reconstruct, remodel, repair, improve, install improvements, buildings, plants, additions, stores, shops, shopping centers, office buildings, hotels and motels and parking garages, multi-family housing facilities, warehouses, distribution centers, machines, fixtures, structures and other facilities related to industrial and commercial uses; to sell, lease, exchange, transfer, assign, subdivide, retain for its own use, mortgage, pledge, hypothecate or otherwise encumber or dispose of any real or personal property or any interest therein; to enter into contracts with developers of property and with other public agencies containing covenants, restrictions and conditions regarding the use of such property for industrial and commercial and related purposes in accordance with the planned project and such other covenants, restrictions and conditions as the authority may deem necessary to prevent a recurrence of blighted, insanitary, undeveloped industrial areas or to effectuate the purposes of this law; to make any of the covenants, restrictions or conditions of the foregoing contracts covenants running with the land, and to provide appropriate remedies for any breach of any such covenants or conditions, including the right in the authority to terminate such contracts and any interest in the property created pursuant thereto; to borrow money and issue bonds and provide security for loans or bonds;

to insure or provide for the insurance of any real or personal property or operations of the authority against any risks or hazards, including the power to pay premiums on any such insurance; and to enter into any contracts necessary to effectuate the purposes of this law; provided, however, that no statutory provision with respect to the acquisition, clearance or disposition of property by other public bodies shall restrict an authority or other public bodies exercising powers hereunder, in such functions, unless the legislature shall specifically so state;

(5) To invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control; to redeem its bonds at the redemption price established therein or to purchase its bonds at less than redemption price, all bonds so redeemed or purchased to be canceled;

(6) To borrow money and to apply for and accept advances, loans, grants, contributions and any other form of financial assistance from the federal government, the state, county, municipality or other public body or from any sources, public or private, for the purposes of this law, to give such security as may be required and to enter into and carry out contracts in connection therewith; an authority, notwithstanding the provisions of any other law, may include in any contract for financial assistance with the federal government for a project such conditions imposed pursuant to federal law as the authority may deem reasonable and appropriate and which are not inconsistent with the purposes of this law;

(7) Within its area of operation, to make or have made all surveys, studies and plans necessary to the

carrying out of the purposes of this law and, in connection therewith, to enter into or upon any land, building or improvement thereon for such purposes and to make soundings, test borings, surveys, appraisals and other preliminary studies and investigations necessary to carry out its powers, but such entry shall constitute no cause of action for trespass in favor of the owner of such land, building or improvement except for injuries resulting from wantonness or malice; and to contract or cooperate with any and all persons or agencies, public or private, in the making and carrying out of the surveys, appraisals, studies and plans;

(8) To prepare plans and provide reasonable assistance for the relocation of families displaced from an industrial or commercial clearance project area to the extent essential for acquiring possession of and clearing the area or parts thereof;

(9) To make such expenditures as may be necessary to carry out the purposes of this law; and to make expenditures from funds obtained from the federal government without regard to any other laws pertaining to the making and approval of appropriations and expenditures;

(10) To delegate to a municipality or other public body any of the powers or functions of the authority with respect to the planning or undertaking of a project, and the municipality or public body is hereby authorized to carry out or perform such powers or functions for the authority;

(11) To loan the proceeds of the bonds or temporary notes hereinafter authorized to provide for the purchase, construction, extension, and improvement of a project

by an industrial developer pursuant to an industrial development contract approved by the authority in accordance with subdivision (2) of section 100.410;

(12) To exercise all powers or parts or combinations of powers necessary, convenient or appropriate to undertake and carry out plans and projects and all the powers herein granted.

100.400. Preparation and approval of plans, regulations governing.—1. Preparation and approval of plans shall be carried out within the following regulations:

(1) An authority shall not acquire real property for a project unless the governing body of the city has approved the plan, as prescribed in subdivision (9) of this section.

(2) An authority shall not prepare a plan for a project area unless the governing body of the city has declared, by resolution or ordinance, the area to be blighted, insanitary or undeveloped industrial area in need of industrial development.

(3) An authority shall not recommend a plan to the governing body of the city until a general plan for the development of the city has been prepared.

(4) The authority itself may prepare or cause to be prepared a plan or any person or agency, public or private, may submit such a plan to an authority. A plan shall be sufficiently complete to indicate its relationship to definite local objectives as to appropriate land uses, improved traffic, foster employment, public transportation, public utilities, recreational and community facilities and other public improvements and the proposed land uses and building requirements in the project area, and shall include without being limited to:

(a) The boundaries of the project area, with a map showing the existing uses and condition of the real property therein;

(b) A land use plan showing proposed uses of the area;

(c) Information showing the standards of population densities, unemployment within area and adjacent areas, land coverage and building intensities in the area after completion of the plan;

(d) A statement of the proposed changes, if any, in zoning ordinances or maps, street layouts, street levels or grades, building codes and ordinances;

(e) A statement as to the kind and number of additional public facilities or utilities which will be required in the area after completion of the plan;

(f) A schedule indicating the estimated length of time needed for completion of each phase of the plan.

(5) Prior to recommending a plan to the governing body for approval, an authority shall submit the plan to the planning agency, if any, of the community in which the project area is located for review and recommendations as to its conformity with the general plan for the development of the city as a whole. The planning agency shall submit its written recommendations with respect to the proposed plan to the authority within thirty days after receipt of the plan for review. Upon receipt of the recommendations of the planning agency, or, if no recommendations are received within the thirty days, then without the recommendations, an authority may recommend the plan to the governing body of the city for approval.

(6) Prior to recommending a plan to the governing body for approval, an authority shall consider whether the proposed land uses and building requirements in the project area are designed with the general purpose of accomplishing, in conformance with the general plan, a coordinated, adjusted and harmonious development of the city and its environs which, in accordance with present and future needs, will promote health, safety, morals, order, convenience, prosperity and the general welfare, as well as efficiency and economy in the process of development; including, among other things, adequate provision for traffic, vehicular parking, the promotion of safety from fire, panic and other dangers, adequate provision for light and air, the promotion of the healthful and convenient distribution of population, employment opportunities, the provision of adequate transportation, water, sewerage and other public utilities, schools, parks, recreational and community facilities and other public requirements, the promotion of sound design and arrangement, the wise and efficient expenditure of public funds, the prevention of the recurrence of insanitary areas, conditions of blight or deterioration or undeveloped industrial or commercial use.

(7) The recommendation of a plan by an authority to the governing body shall be accompanied by the recommendations, if any, of the planning commission concerning the plan: a statement of the proposed method and estimated cost of the acquisition and preparation for the project area and the estimated proceeds or revenues from its disposal to industrial developers; a statement of the proposed method of financing the project; a statement of a feasible method proposed for the relocation of families to be displaced from the project area;

and a schedule indicating the estimated length of time needed for completion of each phase of the plan.

(8) The governing body of the community may hold a public hearing on any plan or substantial modification thereof recommended by the authority, after public notice thereof by publication in a newspaper of general circulation in the community once each week for two consecutive weeks, the last publication to be at least ten days prior to the date set for hearing. The notice shall describe the time, date, place and purpose of the hearing and shall also generally identify the area to be covered by the plan. All interested parties shall be afforded at the public hearing a reasonable opportunity to express their views respecting the proposed plan.

(9) Following the hearing, the governing body may approve a plan if it finds that the plan is feasible and in conformity with the general plan for the development of the community as a whole. A plan which has not been approved by the governing body when recommended by the authority may be recommended again to it with any modifications deemed advisable.

(10) A plan may be modified at any time by the authority, or by the governing body; provided that, if modified after the lease or sale of real property in the project area, the modification must be consented to by the industrial developer of the real property or his successor, or their successors in interest affected by the proposed modification. Where the proposed modification will substantially change the plan as previously approved by the governing body, the modification must similarly be approved by the governing body.

2. As an alternative to the procedures prescribed in subdivisions (2) and (5) of subsection 1, an authority may find an area to be a blighted or insanitary or undeveloped industrial area and in need of industrial or commercial development and may simultaneously prepare a plan and recommend to the governing body of the community the approval of such finding of* a blighted or insanitary or undeveloped industrial area and the approval of a plan, whether prepared by the authority or submitted to the authority, and the governing body may make its finding and approve the plan simultaneously. Simultaneously with such recommendation of a finding of a blighted or insanitary or undeveloped industrial area and recommendation of a plan to the governing body for approval, an authority shall submit the finding of a blighted or insanitary or undeveloped area and the plan to the planning agency, if any, of the community in which the project area is located for review and recommendation as to the conformity of the plan to the general plan for the development of the community as a whole. The planning agency shall submit its written recommendations with respect to the finding of a blighted or insanitary or undeveloped industrial area and the plan to the authority and the local governing body within thirty days after receipt of the findings and the plan for review. Upon receipt of the recommendations of the planning agency, or, if no recommendations are received within the thirty days, then without the recommendations, the governing body may approve the finding of a blighted or insanitary or undeveloped industrial area and may approve the plan in the manner prescribed in subdivisions (8) and (9) of subsection 1.

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*Word "or" appears in original rolls.